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United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

MONTE L. WOLF, Executor of the Estate of
Harry J. Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

MAY 24 1956

PAUL P. O'BRIEN, CLERK



No. 15011

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

MONTE L. WOLF, Executor of the Estate of
Harry J. Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Portland, Oregon,

For Appellee.

In the District Court of the United States for the
District of Oregon

Civil No. 7097

MONTE L. WOLF, Executor of the Estate of
Harry J. Wolf, deceased,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For cause of action against the defendant, plaintiff complains and alleges as follows:

I.

This is a civil action and arises under the laws of the United States of America providing for Internal Revenue, and jurisdiction rests upon Title 28, United States Code, Section 1340, and Title 28, United States Code, Section 1346.

II.

During the calendar years 1942 and 1943, and until his death on February 6, 1948, Harry J. Wolf was a resident of the County of Multnomah, State of Oregon and was then and until his death a citizen of the United States of America.

III.

Plaintiff herein is the duly qualified and acting Executor of the Estate of Harry J. Wolf, deceased,

to whom letters testamentary were granted by the Circuit Court (Probate Department) for the County of Multnomah, State of Oregon, on February 16, 1948.

IV.

At all times from September 1, 1947, to and including October 30, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said Hugh H. Earle is no longer in office.

V.

At all times from July 17, 1933 to and including August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said James W. Maloney is no longer in office.

VI.

During all times mentioned herein the decedent, Harry J. Wolf, kept his personal books and made and filed his income and victory tax returns on the cash receipts and disbursements and calendar year basis.

VII.

That during all times during the taxable years 1942 and 1943, the decedent, Harry J. Wolf, was a member of a partnership known as Alaska Junk Company. Said partnership was comprised of the decedent, Harry J. Wolf, Rose Schnitzer, Sam Schnitzer and Jennie Wolf. Said partnership dur-

ing all times mentioned herein filed its partnership income tax information returns on a calendar year and accrual basis.

VIII.

For the calendar year 1942 Alaska Junk Company reported gross sales in the amount of \$2,038,384.76 on its partnership income tax information return filed on or about March 15, 1943. Included in said purported gross sales were certain items of merchandise delivered to a corporation known as Oregon Electric Steel Rolling Mills in the sum of \$243,975.86, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

IX.

The net income as reported on the information tax return of Alaska Junk Company for 1942 was in the amount of \$236,123.45, of which amount the decedent Harry J. Wolf reported on his individual income and victory tax return the sum of \$64,030.86, said tax return being filed on or about March 15, 1943, and said Sam Schnitzer paid said taxes to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

X.

For the calendar year 1943, Alaska Junk Company reported gross sales in the amount of \$1,463,365.76 on its partnership income tax information return filed on or about March 15, 1944. Included in said purported gross sales were certain items of merchandise delivered to a corporation known as

Oregon Electric Steel Rolling Mills in the sum of \$103,365.76, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

XI.

The net income as reported on the information tax return of Alaska Junk Company for the calendar year 1943 was in the amount of \$246,055.71, of which the decedent, Harry J. Wolf, reported on his individual income and victory tax return the sum of \$66,513.93, said tax return being filed on or about March 15, 1944, and said Harry J. Wolf paid said taxes on or before said date, to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

XII.

In computing the net income of Alaska Junk Company for the calendar year 1943, a loss was claimed on its income tax information return of \$202,350.60 for bad debts on account of the aforementioned merchandise delivered to Oregon Electric Steel Rolling Mills, the amount of which said items had theretofore been carried on the books of Alaska Junk Company as accounts receivable.

XIII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined that the aforementioned loss on account of merchandise delivered to Oregon Electric Steel Rolling Mills was in fact a

capital contribution to said corporation and was not a proper bad debt deduction.

XIV.

On or about March 3, 1947, the Commissioner of Internal Revenue asserted a deficiency against the decedent, Harry J. Wolf, by reason of the disallowance of the bad debt deduction that had been taken on the income tax return of Alaska Junk Company.

XV.

On June 2, 1947, the decedent, Harry J. Wolf, filed his petition with the Tax Court of the United States contending the determination of the Commissioner of Internal Revenue that said accounts receivable of Oregon Electric Steel Rolling Mills were in fact capital contributions was erroneous. Upon hearing the matter, the Tax Court of the United States affirmed the determination of the Commissioner of Internal Revenue and judgment was duly made and entered against the decedent, Harry J. Wolf, in the amount of \$43,287.42. Thereafter the decedent, Harry J. Wolf, paid the amount of said deficiency, together with interest, on the 31st day of December, 1949. Thereafter the decedent, Harry J. Wolf, prosecuted an appeal from the Tax Court's determination to the United States Court of Appeals for the Ninth Circuit, which Court duly entered its judgment affirming the determination of the Tax Court. Thereafter the decedent, Harry J. Wolf, petitioned the Supreme Court of the United States for a Writ of Certiorari to

review the judgment of the United States Court of Appeals and which Court denied said petitions.

XVI.

On or about December 30, 1949, the decedent, Harry J. Wolf, paid the deficiency as asserted as aforesaid and reduced to judgment by the proceedings as aforesaid, to Hugh H. Earle, the then Collector of Internal Revenue for the District of Oregon, additional tax in the sum of \$43,282.00, together with interest on said deficiency in the sum of \$15,040.50.

XVII.

By reason of the income and victory tax payments made on the original return of the decedent, Harry J. Wolf, and the payments made on account of the deficiencies asserted by the Commissioner of Internal Revenue, together with interest on said deficiencies, said taxpayer paid income and victory taxes, together with the interest on the deficiencies in the amount of \$102,938.06, for the taxable year 1943.

XVIII.

By virtue of the determination of the Commissioner of Internal Revenue, the judgment of the Tax Court of the United States, the affirmance of that judgment by the United States Court of Appeals and the denial of the petition for certiorari by the United States Supreme Court as aforesaid, it has been duly adjudicated that the merchandise delivered by Alaska Junk Company to Oregon Electric Steel Rolling Mill were not sales but were capi-

tal contributions; that it was erroneously carried on the books of Alaska Junk Company as accounts receivable and was erroneously included in the gross income of the partnership in making said returns and the income and victory taxes paid by the partners on their distributive shares therefrom erroneously paid; that said amounts should have in fact been excluded from the gross income of said Alaska Junk Company thus reducing the amount of the net income reportable by said Alaska Junk Company, and thus reducing the amount of income reportable by the decedent, Harry J. Wolf, on his individual income and victory tax return for the taxable year 1943.

XIX.

The difference in the amount of the income and victory tax of decedent, Harry J. Wolf, as reported on his original income and victory tax return, together with the deficiency and interest as hereinabove set forth, and the correct amount of income and victory tax for the taxable year 1943, after eliminating from gross income of Alaska Junk Company the merchandise delivered to Oregon Electric Steel Rolling Mill, is \$45,968.34.

XX.

On or about June 20, 1951, the decedent, Harry J. Wolf, filed with the Collector of Internal Revenue on Form 843 a claim for refund of the taxes and interest mentioned in the preceding paragraph, to-wit: \$45,968.34, together with interest as provided by law, a copy of which is attached hereto

and by this reference made a part hereof and marked Exhibit A.

XXI.

On or about August 1, 1951, the Commissioner of Internal Revenue notified the decedent, Harry J. Wolf, by registered mail that his claim for refund had been disallowed.

XXII.

Said sum of \$45,968.34 has not been repaid to the decedent, Harry J. Wolf, and/or the plaintiff herein, and the defendant now erroneously and illegally withholds from plaintiff the said sum of \$45,968.34, and the whole thereof, together with interest thereon at the rate of 6% per annum from December 31, 1949, as provided by law.

Wherefore, plaintiff demands judgment, upon the facts and law, against the defendant for the sum of \$45,968.34, together with interest from December 31, 1949, as provided by law.

/s/ JACOB, JONES & BROWN,
Attorneys for Plaintiff.

Of Counsel:

/s/ S. J. Bischoff

Duly Verified.

EXHIBIT A

CLAIM

To be filed with the Collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

[x] Refund of Taxes Illegally, Erroneously, or Excessively Collected.

* * * * *

Name of taxpayer or purchaser of stamps. Estate of Harry J. Wolf, by Monte L. Wolf, Executor.

Business address: 900 S. W. First Avenue, Portland, Oregon.

1. District in which return (if any) was filed: Oregon.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1942, to Dec. 31, 1943.

3. Character of assessment or tax: Income and victory taxes.

4. Amount of assessment, \$102,938.06; dates of payment 3/15/43 to 12/31/44 and 12/31/49.

* * * * *

6. Amount to be refunded plus interest as provided by law: \$45,912.53.

* * * * *

The claimant believes that this claim should be allowed for the following reasons: See the attached schedule and statements.

I declare under the penalties of perjury that this

Exhibit A—(Continued)

claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated June 19th, 1951.

/s/ Estate of Harry J. Wolf

/s/ By Monte L. Wolf, Executor

Estate of Harry J. Wolf, by Monte L. Wolf,
Executor

1942

INCOME

Dividends	\$.50	
Rent and Royalty		521.67	
Alaska Junk	64,030.86		\$ 64,553.03

DEDUCTIONS

Less 1/4 Sales Alaska Junk Co. held by Tax Court to be Capital Contribution (\$243,975.86)	\$	60,993.96	
State Income Tax	4,125.98		65,119.94
Loss			\$ (566.89)
Donations	\$	1,073.04	

1943

INCOME

Dividends	\$.97	
Rents and Royalties		584.72	
Alaska Junk	66,513.92		
One-fourth Alaska Junk loss disallowed	50,587.65		\$117,687.26

DEDUCTIONS

Interest	\$	269.79	
State Income Tax		2,675.88	
Capital Loss		1,000.00	
Donations		1,381.09	

Exhibit A—(Continued)

One-Fourth Alaska Junk Sales Held by Tax Court to be Capital Contribution (\$103,365.76)			25,841.44	31,168.20
				<hr/>
				\$ 86,519.06
Less Personal Exemption				1,200.00
				<hr/>
				\$ 85,319.00
				<hr/>
Surtax			\$ 47,929.30	
Normal Tax			5,039.33	
Victory Tax			4,001.09	
				<hr/>
				\$ 56,969.72
Tax paid on original return.....			\$ 44,615.56	
Additional tax paid 12/31/49.....			43,282.00	
Interest paid 12/31/49.....			15,040.50	
				<hr/>
Total tax and interest.....				\$102,938.06
				<hr/>
Overpayment—Tax and Interest				\$ 45,968.34

Statement of Facts and Memorandum in Support of
Claims for Refund of Sam Schnitzer, Rose
Schnitzer, Estate of H. J. Wolf and Monte L.
Wolf, Charlotte C. Cohon and Blossom M.
Grayson Transferees of the Estate of Jennie
Wolf for the Tax Years 1942 and 1943:

The claimants and/or their predecessors in interest were, in the tax years in question, members of the partnership known as "Alaska Junk Company".

In said tax years the partnership consisted of Sam Schnitzer, Rose Schnitzer, his wife, Harry J. Wolf and Jennie Wolf, his wife. Each owned a one-fourth interest in the partnership and received a

Exhibit A—(Continued)

one-fourth interest in the net earnings of the partnership. Jennie Wolf died April 8, 1945, and her interest in the partnership vested by virtue of her Will in her children, Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson in equal shares.

Harry J. Wolf died on the 6th day of February, 1948, and his interest in the said partnership vested by virtue of his will in Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson in equal shares.

The said partnership kept its books of account and reported its income and expenses in the tax years in question on the accrual basis.

The said partnership filed its income tax return for the tax year 1942 on or about March 15, 1943, and reported and filed its partnership information return on a calendar year basis. In said tax year it reported gross receipts from sales (on the accrual basis) of \$2,038,384.76. The net income of the partnership in said information return was computed upon that amount of gross sales, and the income tax returns of the individual partners were likewise computed upon the basis of that amount of gross sales.

Included in the said gross receipts of \$2,038,384.76 were sales made by the partnership to a corporation known as The Oregon Electric Steel Rolling Mills in the sum of \$243,975.86, all of which sales were accrued on the books of the partnership as of the end of the tax year 1942, were unpaid at that time, and were carried on the books of the partnership as accounts receivable.

Exhibit A—(Continued)

The net income of the partnership for the tax year 1942, as reported in said information return, which included the sales made to The Oregon Electric Steel Rolling Mills, was the sum of \$236,123.45. The said net partnership income was reported by the individual partners in their individual income tax returns as constructively received, in the following amounts:

Sam Schnitzer	\$ 64,030.86
Rose Schnitzer	54,030.87
Harry J. Wolf	64,030.86
Jennie Wolf	54,030.86
<hr/>	
Total	\$236,123.45

The individual partners filed their income tax returns for said tax year on or about March 15, 1943, reporting said amounts in their respective income tax returns in determining the net taxable income of each and each paid income tax on the full amount of the net income so reported.

The said partnership filed its income tax returns for the tax year 1943 on or about March 15, 1944, and reported and filed its partnership information return on a calendar year basis. In said tax year it reported gross receipts from sales (on the accrual basis) of \$1,463,363.19, the net income of the partnership in said information return was computed upon that amount of gross sales, and the income tax returns of the individual partners were likewise computed upon the basis of that amount of gross sales.

Exhibit A—(Continued)

Included in the said gross receipts of \$1,463,363.19 were sales made by the partnership to The Oregon Electric Steel Rolling Mills in the sum of \$103,365.76, all of which sales were accrued on the books of the partnership as of the end of the tax year 1943 and unpaid at that time, and the amount of said sales was carried on the books of the partnership as an account receivable.

That the net income of the partnership for the tax year 1943 as reported in said information return, which included the sales made to The Oregon Electric Steel Rolling Mills, was the sum of \$246,055.71. That the said net partnership income was reported by the individual partners of said Alaska Junk Company in their individual income tax returns as constructively received by said partners in 1943 in the following amounts:

Sam Schnitzer	\$ 66,513.92
Rose Schnitzer	56,513.93
Harry J. Wolf	66,513.93
Jennie Wolf	56,513.93

Total.....\$246,055.71

In computing the partnership net income for the tax year 1943 the partnership took as a deduction the sum of \$202,350.60, which included losses resulting from sales made by said partnership to The Oregon Electric Steel Rolling Mills in the sum of \$202,350.60, which amount had theretofore been carried on the books of the partnership as an account receivable, and which had been reported in the tax

Exhibit A—(Continued)

years 1942 and 1943 as income constructively received on the accrual basis, and included in the income for the said years by the individual partners as income constructively received and individual income and surtaxes were paid thereon.

On the 3rd day of March, 1947 the Commissioner of Internal Revenue determined and asserted income tax deficiencies against each of the four individual partners on the asserted ground that the merchandise sold by the partnership to The Oregon Electric Steel Rolling Mills, as well as advances made by the partnership to Oregon Electric and payments made by the partnership for the account of Oregon Electric, were in reality capital contributions by the partners to Oregon Electric and accordingly did not constitute sales, advances or payments for the account of Oregon Electric, and on said date of March 3rd, 1947, The Commissioner of Internal Revenue sent to the individual partners of the said partnership the 90-day notices of deficiencies imposed by reason thereof.

At the time the said deficiency letters were sent to the individual partners, the partner, Jennie Wolf, was dead; Mrs. Wolf left a Will devising one-third of her interest in the said partnership to each of her three children, Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson. Said will was duly admitted to probate in the Probate Department of the Circuit Court of the State of Oregon for Multnomah County and the decedent's interest in the said partnership was thereafter dis-

Exhibit A—(Continued)

tributed to the said three legatees on the 1st day of April, 1946, and by virtue of said Will and the distribution the said three legatees became the owners of the decedent's partnership interest in the said partnership.

On June 2, 1947 petitions were filed with the Tax Court of the United States to review the determination of the Commissioner of Internal Revenue assessing said deficiencies by Sam Schnitzer, Harry J. Wolf and by Monte L. Wolf, Charlotte C. Cohon, Blossom M. Grayson as successors to the partnership interest of Jennie Wolf, deceased.

While said proceedings were pending before the Tax Court of the United States the death of the petitioner Harry J. Wolf occurred. He left a Will in which he devised his one-fourth interest in the Alaska Junk Company partnership to his three children, Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson, in equal shares; his Will was duly admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, and in said proceeding Monte L. Wolf was appointed executor of his Estate, letters testamentary were duly issued to him as executor, he duly qualified as such executor, and has ever since been and now is the duly appointed, qualified and acting executor of the estate of said Harry J. Wolf, deceased; thereafter Monte L. Wolf as executor of the Estate of Harry J. Wolf, deceased, was substituted as party petitioner in place and stead of the petitioner Harry J. Wolf in the said proceedings

Exhibit A—(Continued)

pending before the Tax Court of the United States.

Thereafter the said proceedings came on for trial in the Tax Court of the United States, and a judgment was duly made and entered therein adjudicating, among other things, that the sales of merchandise by said partnership of Alaska Junk Company to Oregon Electric Steel Rolling Mills in the tax years 1942 and 1943 did not constitute sales of merchandise and did not create any liabilities from Oregon Electric to the said partnership, but were, in reality, capital contributions by the partnership to Oregon Electric and losses sustained therefrom by the partnership in said tax years did not constitute deductible bad debt losses; based upon said determination, judgment was entered in the Tax Court of the United States on the 9th day of November, 1949 against each of the petitioners in said proceedings as follows:

Sam Schnitzer	\$ 43,287.42
Harry J. Wolf	43,282.00
Monte L. Wolf, Transferee Estate of Jennie Wolf, deceased	14,091.33
Charlotte C. Cohon, Transferee Estate of Jennie Wolf, deceased..	14,091.33
Blossom M. Grayson, Transferee Estate of Jennie Wolf, deceased	14,091.33

By reason of the fact the Commissioner of Internal Revenue determined Rose Schnitzer to be not a partner in Alaska Junk Company, no deficiency was asserted against her until October 17, 1949, on which date a formal notice was sent based

Exhibit A—(Continued)

upon the decision of the Tax Court of the United States. In said notice he asserted a deficiency of \$42,273.99, which said deficiency, together with interest in the sum of \$14,795.90, was paid on January 14, 1950.

Thereafter and on the 31st day of December, 1949 each of the said petitioners paid to the Collector of Internal Revenue for the District of Oregon the amounts of the deficiencies determined against them, as aforesaid, together with interest as set forth in the schedules attached hereto.

Thereafter the said petitioners prosecuted an appeal from the said judgments of the Tax Court of the United States to the United States Court of Appeals for the Ninth Circuit; that thereafter judgments were entered in said court affirming the judgments of the Tax Court of the United States in said proceedings.

Thereafter the petitioners filed with the Supreme Court of the United States their petitions for Writs of Certiorari to review the judgments of the United States Court of Appeals in said proceedings, which said petitions were denied.

By reason of the premises the said judgments of the Tax Court of the United States have become and are now final. The portion of the deficiencies in income tax determined and assessed against Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson, as the successors to the partnership interest of Jennie Wolf, were paid by each of the said Monte L. Wolf, Charlotte C. Cohon and Blos-

Exhibit A—(Continued)

som M. Grayson individually as transferees of the Estate of Jennie Wolf, deceased.

The portion of the deficiencies determined and assessed as against the Estate of Harry J. Wolf, deceased, was paid by Monte L. Wolf as executor of said estate.

By virtue of the income tax payments originally made for the tax years 1942 and 1943 when said tax returns were filed, plus the payments subsequently made by virtue of the aforesaid determinations and judgment, the total amount of income tax and interest payments that were made for said tax years by each of the four partnership interests were as follows:

Sam Schnitzer	\$103,006.54
Rose Schnitzer	94,020.86
Estate of Jennie Wolf	93,915.17
Estate of Harry J. Wolf.....	102,938.06

By virtue of the said determinations of the Commissioner and the judgments affirming the same referred to above, it now appears that the partnership erroneously included in the information tax return of Alaska Junk Company for said tax years the sales made by the partnership to the Oregon Electric Steel Rolling Mills as constructive receipts of income, and the partners in their respective individual tax returns erroneously included in their returns for said tax years the income resulting from the treatment of the sales from the partnership to Oregon Electric Steel Rolling Mills as accrued income.

Exhibit A—(Continued)

upon the decision of the Tax Court of the United States. In said notice he asserted a deficiency of \$42,273.99, which said deficiency, together with interest in the sum of \$14,795.90, was paid on January 14, 1950.

Thereafter and on the 31st day of December, 1949 each of the said petitioners paid to the Collector of Internal Revenue for the District of Oregon the amounts of the deficiencies determined against them, as aforesaid, together with interest as set forth in the schedules attached hereto.

Thereafter the said petitioners prosecuted an appeal from the said judgments of the Tax Court of the United States to the United States Court of Appeals for the Ninth Circuit; that thereafter judgments were entered in said court affirming the judgments of the Tax Court of the United States in said proceedings.

Thereafter the petitioners filed with the Supreme Court of the United States their petitions for Writs of Certiorari to review the judgments of the United States Court of Appeals in said proceedings, which said petitions were denied.

By reason of the premises the said judgments of the Tax Court of the United States have become and are now final. The portion of the deficiencies in income tax determined and assessed against Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson, as the successors to the partnership interest of Jennie Wolf, were paid by each of the said Monte L. Wolf, Charlotte C. Cohon and Blos-

Exhibit A—(Continued)

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The portion of the deficiencies determined and assessed as against the Estate of Harry J. Wolf, deceased, was paid by Monte L. Wolf as executor of said estate.

By virtue of the income tax payments originally made for the tax years 1942 and 1943 when said tax returns were filed, plus the payments subsequently made by virtue of the aforesaid determinations and judgment, the total amount of income tax and interest payments that were made for said tax years by each of the four partnership interests were as follows:

Sam Schnitzer	\$103,006.54
Rose Schnitzer	94,020.86
Estate of Jennie Wolf	93,915.17
Estate of Harry J. Wolf.....	102,938.06

By virtue of the said determinations of the Commissioner and the judgments affirming the same referred to above, it now appears that the partnership erroneously included in the information tax return of Alaska Junk Company for said tax years the sales made by the partnership to the Oregon Electric Steel Rolling Mills as constructive receipts of income, and the partners in their respective individual tax returns erroneously included in their returns for said tax years the income resulting from the treatment of the sales from the partnership to Oregon Electric Steel Rolling Mills as accrued income.

Exhibit A—(Continued)

By reason of the erroneous inclusion of the said sales as income in said tax years the claimants have now recomputed the net income of the partnership and their own distributive shares thereof for the tax years in question by eliminating therefrom the sales made by the partnership to Oregon Electric Steel Rolling Mills and the bad debt deduction disallowed by the Commissioner of Internal Revenue and accrued by the partnership as income in said tax years, as more fully appears by the amended tax returns, copies of which are attached hereto, which amended returns were prepared in accordance with the determinations of the Commissioner of Internal Revenue and of the judgments of the Tax Court of the United States affirmed as aforesaid, and by reason of said recomputation of the tax liability for said tax years the true tax liability for said tax years of each of the individuals owning partnership interests in said Alaska Junk Company is as follows:

Sam Schnitzer	\$56,800.93
Rose Schnitzer	50,176.80
Estate of Harry J. Wolf	56,969.72
Estate of Jennie Wolf	50,176.82

The difference between the total amounts of income tax and interest payments paid by the partners and their successors in interest, the claimants herein, and the amount of the tax liability of each of the partners and their successors in interest as computed in accordance with the amended return submitted herewith are as follows:

Exhibit A—(Continued)

Sam Schnitzer	\$46,205.61
Rose Schnitzer	43,844.06
Estate of Harry Wolf	45,968.34
Monte L. Wolf, Transferee of Jennie Wolf, deceased	14,579.45
Charlotte C. Cohon, Transferee of Jennie Wolf, deceased	14,579.45
Blossom M. Grayson, Transferee of Jennie Wolf, deceased	14,579.45

In summary, these claims are predicated upon the facts that the partnership erroneously, as it now appears from the decisions of the Tax Court of the United States as affirmed, treated the sales to Oregon Electric Steel Rolling Mills as income from sales on its books and accrued the income therefrom, the individual partners were on account thereof required to and did report these sales as income constructively received by them and actually paid income and victory taxes thereon, although payment for said sales has never actually been received by the partnership and/or the individual partners, at the same time the Commissioner asserted, and it has now been judicially determined, that those sales were not sales but capital contributions, and the deduction taken as aforesaid by reason of the failure of Oregon Electric to pay said liabilities was disallowed, so that the claimants and their predecessors in interests paid income taxes on income which was never received actually or constructively.

EXHIBIT A (CONT.)

24

FORM 1065
Internal Revenue Service

UNITED STATES

Page 1

PARTNERSHIP RETURN OF INCOME 1942

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1942

or fiscal year beginning, 1942, and ending, 1943

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

ALASKA JUNK CO.

(Name)

900 S. W. First Avenue

(Street and number)

Portland, Multnomah, Oregon

(Post office)

(County)

(State)

Business or Profession Machinery, Pipe & Scrap Iron

Do Not Use These Spaces

File Code

Serial No.

District

(Date Received)

GROSS INCOME

Gross receipts from business or profession 1,794,408 90

Less cost of goods sold:

(a) Inventory at beginning of year	\$ 484,478 19	
(b) Merchandise bought for sale	1,001,686 90	
(c) Cost of merchandise freight	76,987 90	
(d) Total of lines (a), (b), and (c)	\$ 1,563,152 99	
(e) Less inventory at end of year	231,312 65	1,331,840 34

Gross profit (or loss) from business or profession (item 1 minus item 2) \$ 462,568 56

Income (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):

Alton & Coast Railroad Liquidators, Portland, Oregon 2,410 12

Interest on bank deposits, notes, etc.

Interest on corporation bonds, etc. (except interest to

be reported in item 7) \$

Interest on tax-free covenant bonds upon which a Federal

tax was paid at source \$

Interest on Government obligations, etc.:

(a) From line (h), Schedule A \$

(b) From line (i), Schedule A \$

Rents

Royalties

Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule B)

Dividends

Other income (state nature of income):

Total income in items 3 to 13 (enter nontaxable income in Schedules A and G) \$ 464,978 68

DEDUCTIONS

Salaries and wages (do not include compensation for partners) \$ 333,240 92

Rent 13,637 58

Repairs

Interest on indebtedness (explain in Schedule F) 8,612 37

Taxes (explain in Schedule C) 17,228 07

Losses by fire, storm, shipwreck, or other casualty, or theft (submit schedule)

Bad debts (explain in Schedule D) 1,977 24

a) Depreciation (explain in Schedule E) 7,404 32

b) Amortization of emergency facilities (attach statement)

Depletion of mines, oil and gas wells, timber, etc. (submit schedule)

Other deductions authorized by law (explain in Schedule F) 90,736 59

Total deductions in items 15 to 24

Ordinary net income (item 14 minus item 25) \$ 472,831 09

Net short-term capital gain (or loss) (from line 1, column 4, Summary, Schedule H) \$

Net long-term capital gain (or loss) (from line 2, column 4, Summary, Schedule H) \$

Total of lines (e), (f), and (g), column 3 (enter as item 8 (a), page 1)

Security Notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 8 (b), page 1)

Amount owned at end of year	Interest received or accrued during the year (subject to normal tax and surtax)
\$	\$

Part II **Section 1221** **Rule B.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS.**
(See Instruction 11)

[illegible]

Total net gain (or loss) (enter as item 11, page 1)

the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

of the above items were acquired by you other than by purchase, explain fully how acquired:

Schedule C.—TAXES. (See Instruction 19)

Nature	Amount	
ultnomah County Taxes	\$ 17,228	07
Total (enter as item 19, page 1)	\$ 17,228	07

Schedule D.—BAD DEBTS. (See Instruction 21)

1. Taxable year	2. Net income reported	3. Sales on account	4. Bad debts charged off by organization if no reserve is carried on books	5. If organization carried a reserve—			
				5. Gross amount added to reserve	6. Amount charged against reserve		
	\$ 137,520 73	\$ 1,525,059 74	\$ 11,340 05				
	141,599 08	1,727,425 79	5,241 60				
	254,126 38	1,705,335 29	5,226 20				
	236,123 45	1,815,566 91	1,971 24				

NOTE.—Check whether deduction claimed represents worthless debts charged off ☐, or is an addition to a reserve ☐.

Schedule E.—DEPRECIATION. (See Instruction 22 (a))

[illegible]

Schedule F.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 18 AND 24

1. Item No.	2. Explanation	3. Amount	1. Item No. (continued)	2. Explanation (continued)	3. Amount (continued)
	Interest paid on money borrowed - mostly to First National Bank, Portland, Oregon	\$ 8,612	37	Other deductions	\$90,736

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 29)

Name and address of organization	Amount
Portland Community Chest - Portland, Oregon	650 00
Oregon Jewish Welfare Fund - Portland, Oregon	1,500 00
United Service Organization - Portland, Oregon	50 00
Pantile Paralysis Fund - Portland, Oregon	100 00
George White Service Center, Portland, Oregon	50 00
100 Bond Drive - Portland, Oregon	200 00
miscellaneous	342 16
Total (enter in column 10, Schedule D)	\$ 2,892 16

EXHIBIT A (CONT.)

EXHIBIT A (CONT.)

FORM 1085
Treasury Department
Internal Revenue Service

UNITED STATES

Page 1

PARTNERSHIP RETURN OF INCOME 1943

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1943

or fiscal year beginning, 1943, and ending, 1944

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

ALASKA JUNK CO.

(Name)

900 S. W. First Avenue

(Street and number)

Portland 4, Oregon

(City or town)

(State)

Business or Profession Machinery, Pipe & Scrap Iron

Do Not Use These Spaces

File Code

Serial No.

District

(Date Received)

GROSS INCOME

Gross receipts from business or profession \$ 1,359,997 43

Less cost of goods sold:

(a) Inventory at beginning of year	\$ 231,312 65	
(b) Merchandise bought for sale	582,811 27	
(c) Cost of labor, supplies, etc.	45,857 93	
(d) Total of lines (a), (b), and (c)	\$ 859,981 87	
(e) Less inventory at end of year	338,319 68	521,662 19

Gross profit (or loss) from business or profession (item 1 minus item 2) \$ 838,335 24

Income (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):

Interest on bank deposits, notes, etc. 4,779 09

Interest on corporation bonds, etc. (except interest to be reported in item 7) Less amortizable bond premium

Interest on tax-free covenant bonds upon which a Federal tax was paid at source \$

Interest on Government obligations, etc.:

(a) From line (h), Schedule A	\$	\$
(b) From line (i), Schedule A	\$	\$

Rents

Royalties

Net gain (or loss) from sale or exchange of property other than capital assets (from Schedule B) 3 22

Dividends

Other income (state nature of income):

Total income in items 3 to 13 (enter nontaxable income in Schedules A and G) \$ 843,117 55

DEDUCTIONS

Salaries and wages (do not include compensation for partners) \$ 342,277 29

Rent 11,887 08

Repairs 5,252 94

Interest on indebtedness (explain in Schedule F) 20,456 56

Taxes (explain in Schedule C) 14,983 36

Losses by fire, storm, shipwreck, or other casualty, or theft (submit schedule)

Bad debts (explain in Schedule D) 3,658 32

(a) Depreciation (explain in Schedule E) 6,596 33

(b) Amortization of emergency facilities (attach statement)

Depletion of mines, oil and gas wells, timber, etc. (submit schedule)

Other deductions authorized by law (explain in Schedule F) 92,965 12

Total deductions in items 15 to 24

Ordinary net income (item 14 minus item 25)

Net short-term capital gain (or loss) (from line 1, column 4, Summary, Schedule H) \$ 345,040 55

Net long-term capital gain (or loss) (from line 2, column 4, Summary, Schedule H) \$

Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 8)

Page 3

1. Obligations or securities	2. Amount owned at end of year	3. Interest (and dividends subject to surtax only) received or accrued during the year
Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$
Obligations issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended		
Obligations of United States issued on or before September 1, 1917		
Treasury Notes issued prior to December 1, 1940, Treasury Bills and Treasury Certificates of Indebtedness issued prior to March 1, 1941		
United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941		
Obligations of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941		
Dividends on share accounts in Federal savings and loan associations in case of shares issued prior to March 28, 1942	XXXXXXX	XXX
Total of lines (e), (f), and (g), column 3 (enter as item 8 (a), page 1)		\$
Treasury Notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States or any agency or instrumentality thereof (enter amount of interest as item 8 (b), page 1)	Amount owned at end of year \$	Interest received or accrued during the year (subject to normal tax and surtax) \$

Schedule B.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 11)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (furnish details)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
Office fixtures	5/35	\$ 25.00	\$ 101.37		\$ 82.81	\$ 6.144
Total net gain (or loss) (enter as item 11, page 1)						\$ 3.22
If the family, fiduciary, or business relationship to you, if any, of purchaser of any of the above items: None						
If any of the above items were acquired by you other than by purchase, explain fully how acquired:						

Schedule C.—TAXES. (See Instruction 19)

Nature	Amount
Multnomah County, Property Taxes	\$ 13,931.88
Clatsop County, Property Taxes	993.28
Washington County, Property Taxes	58.20
Total (enter as item 19, page 1)	\$ 14,983.36

Schedule D.—BAD DEBTS. (See Instruction 21)

1. Taxable year	2. Net income reported	3. Sales on account	4. Bad debts of organization if no reserve is carried on books	If organization carried a reserve—	
				5. Gross amount added to reserve	6. Amount charged against reserve
	\$ 141,599.08	\$ 727,425.79	\$ 5,241.60		\$
	254,126.38	1,705,335.29	5,226.20		
	236,123.45	1,815,566.91	1,971.24		
	246,055.71	1,208,709.91	206,008.92		

NOTE.—Check whether deduction claimed represents debts which have become worthless ☒ or is an addition to a reserve ☐.

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 29)

Name and address of organization	Amount
Oregon Jewish Welfare	\$ 2,000.00
United War Chest	1,000.00
American Red Cross	250.00
Congregation Shalom Torah	180.00
Infantile Paralysis Fund	100.00
Israeli Rehabilitation Fund	50.00
Miscellaneous	344.33
Total (enter in column 10, Schedule J)	\$ 3,924.33

EXHIBIT A (CONT.)

Schedule J.—PARTNERS' SHARES OF INCOME AND CREDITS. (See instruction 29)

Page 4

1. Name and address of each partner (Designate nonresident alien) Where return of partner or member is filed in another collection district, specify district If the full time of any partner was not devoted to the business, the percentage of time devoted must be stated	2. Ordinary income less interest, taxes, etc. (From Schedule H, line 1, minus carry-over, if any)	3. Net short-term gain (or loss) from sale or exchange of capital assets (From Schedule H, line 1, minus carry-over, if any)	4. Net long-term gain (or loss) from sale or exchange of capital assets (From Schedule H, line 1, minus carry-over, if any)
Schnitzer, 1011 S.W. Vista, Portland, Ore.		\$1,200 13	
Mrs. A. Schnitzer, 1011 S.W. Vista, Portland		\$1,200 13	
H. J. Wolf, 3111 S.E. Lambert, Portland,		\$1,200 13	
Mrs. J. Wolf, 3111 S.E. Lambert, Portland,		\$1,200 13	
Totals	\$	\$ 345,040 55	\$

CONTINUATION OF SCHEDULE J

Use the entire column for reporting above-deductible interest	6. Wholly tax-exempt obligations (line (a), (b), (c), and (d) of Schedule A)		7. United States Savings Bonds and Treasury Bonds (line (e), Schedule A)		8. Obligations of certain instrumentalities of the United States (line (f), Schedule A)		9. Earned income	10. Charitable contributions (from Schedule I)	11. Federal income tax paid at source (2 percent of gross amount in item 7, page 1)	12. Income and profits taxes paid to a foreign country or United States possession
	a. Principal	b. Interest	a. Principal	b. Interest less amortizable bond premium	a. Principal	b. Interest less amortizable bond premium				
a.	\$	\$	\$	\$	\$	\$	\$	\$ 981 08	\$	\$
b.								981 08		
c.								981 08		
d.								981 09		
Totals	\$	\$	\$	\$	\$	\$	\$	\$ 3,924 33	\$	\$

QUESTIONS

Date of organization 1911
 Nature of organization (partnership, syndicate, pool, joint venture, etc.) Partnership
 Was a return filed for preceding year? Yes If so, to which collector's office was it sent? Portland, Oregon
 Check whether this return was prepared on the cash ☐ or accrual ☒ basis.
 State whether inventories at the beginning and end of the taxable year were valued at (a) cost, or (b) cost or market, whichever is lower.
 If any other basis is used, attach statement describing basis fully, state why used and the date inventory was last reconciled with stock.
 Did the organization at any time during its taxable year have in its employ more than eight individuals? (Answer "Yes" or "No") Yes

If answer is "Yes," has the organization in this return taken a deduction for any amount of wages or salaries representing an increase or decrease in rate during the taxable year? (Answer "Yes" or "No") Yes
 If answer to second question is "Yes," attach a statement explaining all such increases or decreases. If any of such increases or decreases required the prior approval of the National War Labor Board or the Commissioner of Internal Revenue as stated in instruction 15, attach also a copy of the authorization for each of such increases or decreases.

7. Did the organization at any time during the taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company, as defined in section 501 of the Internal Revenue Code? (Answer "Yes" or "No") No
 If answer is "Yes," attach schedule required by Instruction I.
 8. Was return of information on Forms 1096 and 1099, or Forms V-2 and W-2, filed for the calendar year 1943? (See Instruction H) Yes

AFFIDAVIT (See instruction D)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the accounting period stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Signature of person (other than partner or member) preparing return (Date)
 (Name of firm or employer, if any)
 Subscribed and sworn to before me this _____ day of _____, 194_____
 (Signature of officer administering oath) (Title)

Signature of partner or member (Date)
 (Address of partner or member)
 Subscribed and sworn to before me this _____ day of _____, 194_____
 (Signature of officer administering oath) (Title)

EXHIBIT A (CONT.)

[Title of District Court and Cause.]

MOTION TO CONSOLIDATE

The defendant moves the Court to consolidate these actions for hearing because the actions all grow out of a consolidated proceeding before the Tax Court of the United States in the case of Sam Schnitzer, et al. vs. Commissioner, 13 T. C. 43, and the decision of that Court in that proceeding. Accordingly, a decision in the case of one of the plaintiffs' actions will be binding with respect to each of the other plaintiffs.

October, 1953.

/s/ ROBERT L. DRESSLER,
Asst. United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Filed October 19, 1953.

[Title of District Court and Cause.]

DEFENDANT'S MOTION TO DISMISS COMPLAINT

The defendant moves the Court to dismiss this action under Rule 12(b) of the Federal Rules of Civil Procedure, because the Court lacks jurisdiction of this action, in that it affirmatively appears from the face of the complaint that the Tax Court of the United States made and entered its decision

in a proceeding instituted by the decedent, Harry J. Wolf, whose executor is the plaintiff in the present action, wherein that Court determined there was a deficiency in income tax due from the decedent for the taxable year 1943; that thereafter the decedent prosecuted an appeal from that Court's determination to the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the Tax Court; and that thereafter the Supreme Court of the United States denied decedent's petition for a writ of certiorari to review the judgment of the United States Court of Appeals. Therefore, the suit is barred by the provisions of Section 322(c) of the Internal Revenue Code, because the decision of the Tax Court has become final within the purview of Section 1140(b)(2) of that Code, and this Court lacks jurisdiction to review that decision under Section 1141 thereof.

The defendant also moves the Court to extend its time to answer the complaint until the decision on this motion.

/s/ ROBERT L. DRESSLER,
Asst. United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Filed October 19, 1953.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that a motion has been filed by the United States of America asking for an order of this Court to consolidate these actions for hearing and determination; and it further appearing that good cause exists therefor; it is hereby

Ordered that the above-entitled actions be and they are hereby consolidated for hearing and determination.

Dated this 19th day of October, 1953.

/s/ CLAUDE McCOLLOCH,
District Judge

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 2, 1953

Plaintiff appearing by Mr. S. J. Bischoff, of counsel, and the defendant by Mr. Leland T. Atherton, Special Assistant to the Attorney General. Whereupon, this cause comes on to be heard upon the motion of the defendant to dismiss the complaint herein, and the Court having heard the arguments of counsel, reserves its decision.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and Robert L. Dressler, Assistant United States Attorney, and in answer to plaintiff's complaint, admits, denies and alleges as follows:

I.

For answer to the allegations contained in Paragraph I of the complaint, defendant denies that this Court has jurisdiction of this action because defendant is reliably informed and therefore believes that the Estate of Harry J. Wolf, deceased, by Monte L. Wolf, Executor, who is the plaintiff in the present action, filed a petition with the Tax Court of the United States for the redetermination of a deficiency in income and victory tax assessed against decedent's estate for the taxable year 1943, and that the Tax Court, on November 9, 1949, made and entered its decision that there was a deficiency in income and victory tax due from said decedent's estate for the calendar year 1943 in the amount of \$43,282.00, which decision has become final; and this action is therefore barred by the provisions of Section 322 (c) of the Internal Revenue Code, and this Court lacks jurisdiction to review the Tax Court's decision, in accordance with the provisions of Section 1141 of the Internal Revenue Code.

II.

Admits the allegations contained in Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV and XVI, except that in respect to the allegations contained in Paragraph X the correct amount should be \$1,463,363.19 instead of \$1,463,365.76, and in respect to the allegations contained in Paragraph XV, the defendant is reliably informed and therefore believes that the petition mentioned therein was filed on May 26, 1947 instead of on June 2, 1947, and that the Tax Court's decision or judgment entered against the decedent, Harry J. Wolf, was in the amount of \$43,282.00 instead of \$43,287.42, as alleged in Paragraph XV of the complaint.

III.

Denies the allegations contained in Paragraph XVII of the complaint.

IV.

Admits the allegations contained in Paragraph XVIII of the complaint.

V.

Denies the allegations contained in Paragraph XIX of the complaint.

VI.

Admits the allegations contained in Paragraphs XX and XXI of the complaint.

VII.

Denies the allegations contained in Paragraph XXII of the complaint, except that the defendant

admits that the sum of \$45,968.34 referred to therein has not been repaid to the decedent, Harry J. Wolf, or to the plaintiff herein.

VIII.

For a first, separate and complete defense, defendant avers that this Court lacks jurisdiction of the subject matter of this action under the provisions of Internal Revenue Code, Section 1141(a); and that this suit is barred by the provisions of Internal Revenue Code, Section 322(c), because

(1) the Estate of Harry J. Wolf, deceased, by Monte L. Wolf, Executor of this estate, the plaintiff in this cause, timely filed a petition with the Tax Court of the United States in a proceeding bearing Docket No. 14209, for the redetermination of the deficiency in income and victory tax for the calendar year 1943, asserted against decedent's estate by the Commissioner of Internal Revenue, which that Court affirmed in its opinion promulgated July 14, 1949; and

(2) pursuant to that opinion the respondent filed a computation on October 6, 1949, and the petitioner (Estate of Harry J. Wolf, deceased, by Monte L. Wolf, Executor, the plaintiff herein) on November 7, 1949, filed an acquiescence in the computation filed by the respondent, whereupon the Tax Court on November 9, 1949, entered its decision wherein it ordered and decided that there was a deficiency in income and victory tax due from decedent's estate for the calendar year 1943 in the

amount of \$43,282.00, which has not been reversed on modified, and has become final and satisfied.

IX.

For a second, separate and complete defense, defendant further avers that the complaint fails to state a claim upon which relief can be granted because defendant is reliably informed and therefore believes that in a proceeding heretofore had in the Tax Court of the United States, in which the Estate of Harry J. Wolf, deceased, was the petitioner, and the Commissioner of Internal Revenue was respondent, bearing Docket No. 14209, it was, among other things, alleged in the petition that the Commissioner's determination that certain accounts receivable of Oregon Electric Steel Rolling Mills for merchandise delivered to it by Alaska Junk Company were capital contributions, was erroneous; and that, upon hearing the matter, the Tax Court affirmed the Commissioner's determination, and duly entered its decision that there was due from decedent's estate a deficiency in income and victory tax for the calendar year 1943 in the amount of \$43,282.00, which was paid by the estate, that the Estate prosecuted an appeal from the Tax Court's decision to the United States Court of Appeals for the Ninth Circuit which duly affirmed the Tax Court's decision; and the United States Supreme Court thereafter denied the estate's petition for a writ of certiorari; and the Tax Court's decision stands unreversed and unmodified, and avers that the matters and things above set forth, which

were determined, adjudged and decreed in that decision were and are res judicata between the plaintiff and the defendant, in this cause, under the provisions of Internal Revenue Code, Section 3772(d).

X.

For a third, separate and complete defense, defendant further avers, upon information and belief, that the Estate of Harry J. Wolf, deceased, by Monte L. Wolf, Executor, the plaintiff herein, on November 7, 1949, filed with Tax Court of the United States an acquiescence in the computation filed on October 6, 1949 by the respondent with that Court showing a deficiency in income and victory tax for the calendar year 1943 in the amount of \$43,282.00, pursuant to the opinion of that Court promulgated on July 14, 1949, in the proceeding bearing Docket No. 14209, instituted by decedent's estate for the redetermination of the deficiency in income and victory tax for that calendar year, asserted by the Commissioner of Internal Revenue against said estate, and that, accordingly, on November 9, 1949, the Tax Court duly entered its decision in that proceeding, wherein it was ordered and decided that there was a deficiency in income and victory tax due from decedent's estate for the calendar year 1943 in the amount of \$43,282.00; and defendant further avers upon information and belief, that said decision of the Tax Court has not been reversed or modified, and has become final and satisfied, wherefore defendant avers that said decision or judgment of the Tax Court is a bar to this

action and conclusive not only as to matters actually presented but as to every ground of recovery that might have been presented; and that plaintiff is estopped by that decision and by the estate's acquiescence in the computation of the amount of the tax deficiency so ordered and decided by the Tax Court, from any recovery herein.

Wherefore, defendant prays that the complaint herein be dismissed and that judgment be entered in its favor and against the plaintiff, together with costs and disbursements of this action.

HENRY L. HESS,

U. S. Attorney for the District of
Oregon

/s/ ROBERT L. DRESSLER,

Asst. United States Attorney

Certificate of Service attached

[Endorsed]: Filed Dec. 2, 1953.

[Title of District Court and Cause.]

STIPULATION FOR THE ENTRY OF AN
ORDER CONSOLIDATING THE ABOVE
ENTITLED ACTIONS FOR TRIAL

It is hereby stipulated by and between the parties hereto, by their respective Counsel, that all of the above entitled actions be consolidated for trial for the reason that the basic issues of law and fact in the above entitled actions are the same and the

right of the plaintiffs in said actions to recover will depend upon the determination of the same basic issues of law and fact.

It is further stipulated that all exhibits that may be offered and/or admitted in evidence upon the consolidated trial of said actions, shall be deemed to have been offered and admitted in each of said cases and shall be deemed a part of the record in each of the said cases without the necessity of filing copies of said exhibits in all of said cases.

It is further stipulated, subject to the approval of the Court, that an Order may be entered upon this stipulation without further notice.

Dated: January 24, 1955.

/s/ S. J. BISCHOFF,

Attorney for Plaintiffs

/s/ C. E. LUCKEY,

Attorney for Defendant

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

ORDER CONSOLIDATING THE ABOVE CASES FOR TRIAL

Upon the stipulation of the parties filed herein, it is

Ordered, that the above entitled actions be, and the same hereby are, consolidated for trial; and it is further

Ordered, that all exhibits offered and/or admitted

in evidence upon consolidated trial of said actions, shall be deemed to have been offered and admitted in each of said actions and shall be deemed a part of the record in each of said actions without the necessity of filing copies of such exhibits in each of said cases.

Dated: February 28, 1955.

/s/ GUS J. SOLOMON,
Judge

[Endorsed]: Filed February 28, 1955.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

At this time the above entitled cause came on for pre-trial before the undersigned Judge of the above entitled Court. Plaintiff appeared herein by S. J. Bischoff, his Attorney. Defendant appeared herein by and through C. E. Luckey and as its Attorney.

The following are the agreed facts:

I.

During the calendar years 1942 and 1943, and until his death on February 6, 1948, Harry J. Wolf was a resident of the County of Multnomah, State of Oregon, and was then and until his death a citizen of the United States of America.

II.

Plaintiff herein is the duly qualified and acting Executor of the Estate of Harry J. Wolf, de-

ceased, to whom letters testamentary were granted by the Circuit Court (Probate Department) for the County of Multnomah, State of Oregon, on February 16, 1948.

III.

At all times from September 1, 1947, to and including October 30, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said Hugh H. Earle is no longer in office.

IV.

At all times from July 17, 1933 to and including August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said James W. Maloney is no longer in office.

V.

During all times mentioned herein the decedent, Harry J. Wolf, kept his personal books and made and filed his income and victory tax returns on the cash receipts and disbursements and calendar year basis.

VI.

That during all times during the taxable years 1942 and 1943, the decedent, Harry J. Wolf, was a member of a partnership known as Alaska Junk Company. Said partnership was comprised of the decedent, Harry J. Wolf, Rose Schnitzer, Sam Schnitzer and Jennie Wolf. Said partnership during all times mentioned herein, filed its partnership

income tax information returns on a calendar year and accrual basis.

VII.

For the calendar year 1942 Alaska Junk Company reported gross sales in the amount of \$2,038,-384.76 on its partnership income tax information return filed on or about March 15, 1943. Included in said purported gross sales were certain items of merchandise delivered to a corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$243,975.86, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

VIII.

The net income as reported on the information tax return of Alaska Junk Company for 1942 was in the amount of \$236,123.45, of which amount the decedent Harry J. Wolf reported on his individual income and victory tax return the sum of \$64,-030.86 said tax return being filed on or about March 15, 1943, and said Harry J. Wolf paid said taxes to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

IX.

For the calendar year 1943, Alaska Junk Company reported gross sales in the amount of \$1,463,-363.19 on its partnership income tax information return filed on or about March 15, 1944. Included in said purported gross sales were certain items of merchandise delivered to a corporation known as Oregon Electric Steel Rolling Mills in the sum of

\$103,365.76, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

X.

The net income as reported on the information tax return of Alaska Junk Company for the calendar year 1943 was in the amount of \$246,055.71, of which the decedent, Harry J. Wolf, reported on his individual income and victory tax return the sum of \$66,513.93 said tax return being filed on or about March 15, 1944, and said Harry J. Wolf paid said taxes on or before said date, to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

XI.

In computing the net income of Alaska Junk Company for the calendar year 1943, a loss was claimed on its income tax information return of \$202,350.60 for bad debts on account of the aforementioned merchandise delivered to Oregon Electric Steel Rolling Mills, the amount of which said items had theretofore been carried on the books of Alaska Junk Company as accounts receivable.

XII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined that the aforementioned loss on account of merchandise delivered to Oregon Electric Steel Rolling Mills was in fact a capital contribution to said corporation and was not a proper bad debt deduction.

XIII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined a deficiency in income and victory tax for the calendar year 1943 against plaintiff herein, Executor of the Estate of Harry J. Wolf, deceased, by reason of the disallowance of the said bad debt deduction that had been taken on the information tax return of Alaska Junk Company.

XIV.

On June 2, 1947, the plaintiff, Monte L. Wolf, Executor of the Estate of Harry J. Wolf, filed his petition with The Tax Court of the United States in Docket No. 14209 contending that the determination of the Commissioner of Internal Revenue, to the effect that said accounts receivable of the Oregon Electric Steel Rolling Mills were in fact capital contributions, was erroneous. Upon hearing the matter, the Tax Court of the United States determined the issues in favor of the Commissioner of Internal Revenue and promulgated its finding of fact and opinion on July 14, 1949.

The Court withheld entry of its decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion. The Commissioner filed his computation on October 6, 1949, showing a total liability of \$43,282.00 due and owing by Harry J. Wolf. On November 7, 1949, the plaintiff, Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, filed his acquiescence in the computation

submitted by the Commissioner. Thereafter, on November 9, 1949, the Court entered its final order and decision determining a deficiency on the part of the plaintiff, Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, in income and victory tax for the calendar year 1943, for \$43,282.00 by reason of the said determination.

Thereafter, on January 4, 1950, the plaintiff, Monte L. Wolf, Executor of the Estate of Harry J. Wolf, prosecuted an appeal from the decision of The Tax Court of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit rendered a per curiam opinion under date of July 24, 1950, affirming the decision of the Tax Court. On October 30, 1950, the plaintiff, Monte L. Wolf, Executor of the Estate of Harry J. Wolf, petitioned the Supreme Court of the United States for a writ of certiorari to review the judgment of the Court of Appeals. The Supreme Court denied certiorari on January 2, 1951 (340 U. S. 911).

The parties stipulate that the findings of fact and the opinion of the Tax Court and the per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit are to be considered as part of the evidence and record before this Court; that said findings of fact and opinions are reported in the report of the Tax Court proceedings entitled *Sam Schnitzer, et al vs. Commissioner of Internal Revenue* at 13 T.C. 43, and in the report of the Court of Appeals proceeding of the same name at 183 F.2d, 70; and that said reports are hereby incorporated and made a part of this stipulation.

XV.

On December 30, 1949, plaintiff, Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, paid the deficiency asserted as aforesaid and determined by the said judgment, to Hugh H. Earle, the then Collector of Internal Revenue for the District of Oregon, the amount so paid by plaintiff being \$43,282.00, together with interest on said deficiency in the sum of \$15,040.05, total \$58,322.05.

XVI.

By reason of the income and victory tax payments made on the original return of Harry Wolf and the payments made on account of the deficiencies determined by the Commissioner of Internal Revenue and affirmed by The Tax Court of the United States as aforesaid, together with the interest on said deficiencies, the said taxpayer paid income and victory taxes, together with the interest on the deficiencies, in the amount of \$102,938.06 for the taxable year 1943.

XVII.

By virtue of the determination of the Commissioner of Internal Revenue, the decision of the Tax Court of the United States, the affirmance of that decision by the Court of Appeals for the Ninth Circuit and the denial of the petition for certiorari by the United States Supreme Court, as aforesaid, it has been adjudicated in effect that the merchandise sold and delivered by Alaska Junk Company

to Oregon Electric Steel Rolling Mills were not sales but capital contributions.

As a result of said adjudication, it follows that the "sales" to Oregon Electric Steel Rolling Mills were erroneously carried on the books of the Alaska Junk Company as accounts receivable; they were erroneously included in the gross income of the partnership for 1942 and 1943; the income and victory taxes paid by the partners including Harry J. Wolf on their distributive shares therefrom under the original returns, were erroneously paid; and the amounts of such "sales" should have been excluded from the gross income of Alaska Junk Company, thus reducing the amount of the net income reportable by said Alaska Junk Company, and thus reducing the amount of income reportable by the deceased, Harry J. Wolf, on his individual income and victory tax return for the taxable year 1943.

XVIII.

On or about June 21, 1951, Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, filed with the Collector of Internal Revenue for the District of Oregon, on Form 843, a claim for refund of the taxes and interest in the sum of \$45,912.53, together with interest thereon as provided by law, a copy of which claim is attached to the complaint herein. It is stipulated that the copy of the claim attached to the complaint herein is a true and correct copy of the claim filed as aforesaid and may be marked and admitted as "Plaintiff's Pre-Trial Exhibit No. 1".

XIX.

On or about August 1, 1951, the Commissioner of Internal Revenue notified Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, by registered mail, that his said claim for refund had been disallowed.

XX.

That the said sum of \$45,912.53 has not been repaid to Harry J. Wolf or the plaintiff herein.

XXI.

In its returns for the years 1942 and 1943, the partnership, Alaska Junk Company, reported sales, costs of sales, gross profits, other incomes, total incomes, deductions and net incomes as follows:

	1942	1943
Sales.....	\$ 2,038,384.76	\$ 1,463,363.19
Cost of Sales.....	1,331,840.34	521,662.19
Gross profits.....	\$ 706,544.42	\$ 941,701.00
Other income.....	2,410.12	4,782.31
Total Income.....	\$ 708,954.54	\$ 946,483.31
Deductions.....	(a) 472,831.09	(a) 700,427.60
Net income.....	\$ 236,123.45	\$ 246,055.71

(a) Total deductions claimed for 1942 and 1943 included bad debts in the respective amounts of \$1,971.24 and \$206,008.92.

XXII.

In computing the amount of the refund claimed by the plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff eliminated the merchandise sold and delivered to Oregon Elec-

tric Steel Rolling Mills in the amount of \$243,975.86 and \$103,365.76 from the gross sales reported in the original returns of the partnership, as aforesaid, thus computing the refund on the basis of gross sales in the amount of \$1,794,408.90 and \$1,359,997.43 for the years 1942 and 1943, respectively.

XXIII.

In computing the amount of refund claimed by plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff used the same cost of sales reported in the original returns of the partnership, that is, \$1,331,840.34 and \$521,662.19 for the years 1942 and 1943, respectively. The plaintiff did not eliminate the cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, that is, plaintiff did not reduce the cost of sales as reported in the original returns of the partnership by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

XXIV.

The parties stipulate that the merchandise sold and delivered to Oregon Electric Steel Rolling Mills for the years 1942 and 1943, the amounts of which have been excluded from gross income in computing the refund claimed by the plaintiff, had a cost of \$159,389.43 and \$36,849.89, respectively.

XXV.

The difference in the amount of income and victory tax of the deceased, Harry J. Wolf, as re-

ported on his original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for the taxable year 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, is the sum of \$41,608.89.

The difference in the amount of income and victory tax of the deceased, Harry J. Wolf, as reported on his original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the cost of said merchandise, is the sum of \$24,955.82.

The parties stipulate that the above computations are true and correct and that in the event the Court shall determine that the prosecution of this action is not barred by Section 322(c) of the Internal Revenue Code of 1939, or by the principle of res adjudicata, and/or the doctrine of collateral estoppel, the judgment to be entered in favor of the plaintiff, shall be in accordance with and for the amount of overpayment shown in whichever of the above computations is determined by the Court to be applicable under the circumstances, to-wit:

\$41,608.89 or \$24,955.82 as the case may be;
(plus interest as provided by law).

XXVI.

That in the computation submitted by the Commissioner of Internal Revenue on October 6, 1949, pursuant to Rule 50 of the Tax Court's Rules of Practice, as indicated in paragraph XIV above, the amount of sales which the Tax Court concluded were capital contributions were not eliminated from the gross sales as originally reported by the partnership, nor was the cost of such sales eliminated from the cost of goods sold as originally reported by said partnership. That Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, on November 7, 1949, filed his acquiescence in the computation submitted by the Commissioner of Internal Revenue, and that on November 9, 1949, the Tax Court entered its final order and decision in the matter. A true and correct copy of said computation, acquiescence and decision is attached hereto, and it is stipulated that the same may be admitted in evidence and marked as "Defendant's Pre-Trial Exhibit 1".

XXVII.

The Tax Court proceedings entitled "Sam Schnitzer et al v. Commissioner of Internal Revenue", Docket Nos. 14208, 14209, 14278, 14279, 14280 and 14372, reported in 13 T.C. 43, are as shown and contained in the transcript of record No. 12471, which transcript accompanied the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It is stipulated by the parties that said transcript is a true and correct copy of the pleadings, findings of fact, opinion

and decision of the Tax Court in said proceedings, and pertinent testimony and evidence adduced therein, together with the petition for review and per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit. It is further stipulated that said copy of the transcript of the Tax Court proceedings as aforesaid may be marked and admitted in evidence as "Joint Pre-Trial Exhibit No. 1".

Defendant's Pre-Trial Exhibit No. 1

The Tax Court of the United States
Washington

Docket No. 14209

Estate of Harry J. Wolf, Deceased, by Monte L. Wolf, Executor of said Estate, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Decision

Pursuant to Opinion of the Tax Court promulgated July 14, 1949, the respondent filed a computation on October 6, 1949, and the petitioner, on November 7, 1949, filed an acquiescence in the computation as filed by the respondent. Now, therefore, it is

Ordered and Decided: That there is a deficiency in income and victory tax due from this petitioner for the calendar year 1943 in the amount of \$43,282.

/s/ Luther A. Johnson, Judge

Entered: Nov. 9, 1949.

[Title of Tax Court and Cause No. 14209.]

Respondent's Computation for Entry of Decision

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Tax Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Tax Court, pursuant to the statutes in such cases made and provided.

/s/ Charles Oliphant, Chief Counsel,
Bureau of Internal Revenue

Of Counsel:

Wilford H. Payne, Division Counsel,
John H. Pigg, Leonard A. Marcussen, Special
Attorneys, Bureau of Internal Revenue

JHP:wmm 9-21-49

AUDIT STATEMENT

In re: Estate of Harry J. Wolf, Deceased,
Monte L. Wolf, Executor,
3111 S. E. Lambert
Portland, Oregon

Docket No. 14209

Tax Liability for the Taxable Year Ended December 31, 1943

	<u>Deficiency</u>
Income and Victory Tax	\$43,282.00

Recomputation of tax liability prepared in accordance with the
Opinion of The Tax Court of the United States promulgated July 14, 1949.

Year 1942

Schedule 1

Net Income

Net income as disclosed by the deficiency notice dated March 3, 1947	\$112,661.84
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As adjusted, based on the Opinion of The Tax Court of the United States promulgated July 14, 1949	<u>59,354.01</u>
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Adjustment (Decrease)	\$ 53,307.83
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Addition:

(a) Adjustment of deduction for Contributions	\$ 723.04
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Deduction:

(b) Adjustment of partnership income	<u>54,030.87</u>
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Net decrease in income	\$ 53,307.83
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Schedule 2

Explanation of Adjustments

(a) Net income is increased \$723.04, representing an adjustment to Contributions. Computation of adjustment is shown below:

Deduction for Contributions as per the Opinion of The Tax Court of the United States, see Exhibit A	\$ 723.04
Deduction for Contributions allowed by the deficiency notice	<u>1,446.08</u>
Decrease in deduction for Contributions	\$ 723.04

(b) Net income is decreased \$54,030.87, representing an adjustment to partnership income of petitioner, as a result of Opinion of The Tax Court of the United States holding that petitioner's wife, Jennie Wolf, held a partnership interest in the income of the Alaska Junk Company. Computation of Adjustment is shown below:

Partnership income as per the Opinion of The Tax Court of the United States, see Exhibit A	\$ 64,030.86
Partnership income as per the deficiency notice	<u>118,061.73</u>
Decrease in partnership income	\$ 54,030.87

Schedule No. 3

Computation of Income Tax

Net income from Schedule No. 1	\$ 59,354.01
Less: Personal exemption	<u>1,200.00</u>
Surtax net income	\$ 58,154.01
Less: Earned income credit (10% of 20% of \$64,030.86)	<u>1,280.62</u>
Income subject to normal tax	\$ 56,873.39
Normal tax on \$56,873.39 at 6%	3,412.40
Surtax on \$58,154.01	<u>28,621.68</u>
Tentative income tax	\$ 32,034.08

Year 1943

Schedule 4

<u>Net Income</u>	<u>Income Tax</u>	<u>Victory Tax</u>
Net income as disclosed by the deficiency notice dated March 3, 1947	\$218,481.00	\$224,657.75
As adjusted, based on the Opinion of The Tax Court of the United States promulgated July 14, 1949	<u>112,360.52</u>	<u>117,556.17</u>
Adjustment (Decrease)	\$106,120.48	\$107,101.58
Addition:		
(a) Adjustment of deduction for contributions	981.10	None
Deduction		
(b) Adjustment of partnership income	<u>107,101.58</u>	<u>107,101.58</u>
Net decrease in income	\$106,120.48	\$107,101.58

Schedule 5

Explanation of Adjustments

(a) Net income is increased \$981.10, representing an adjustment to contributions. Computation of adjustment is shown below:

Deduction for contributions as per the Opinion of The Tax Court of the United States, see Exhibit A	\$ 981.08
Deduction for contributions allowed by the deficiency notice	<u>1,962.18</u>
Decrease in deduction for contributions	\$ 981.10

(b) Net income is decreased \$107,101.58, representing an Adjustment to partnership income of the petitioner, as a result of Opinion of The Tax Court of the United States holding that petitioner's wife, Jennie Wolf, held a partnership interest in the income of the Alaska Junk Company. Computation of Adjustment is shown below:

Partnership income as per the Opinion of The Tax Court of the United States, see Exhibit A	\$117,101.58
Partnership income as per the deficiency notice	<u>224,203.16</u>
Decrease in partnership income	\$107,101.58

- 4 -

Estate of Harry J. Wolf, Deceased
Monte L. Wolf, Executor

Audit Statement

Schedule 6Computation of Income and Victory Tax

Income tax net income, from Schedule No. 4		\$112,360.52
Less: Personal exemption		<u>1,200.00</u>
Surtax net income		\$111,160.52
Less: Earned income credit		<u>1,400.00</u>
Balance subject to normal tax		\$109,760.52
Normal tax at 6% on \$109,760.52	\$ 6,585.63	
Surtax on \$111,160.52	<u>67,956.81</u>	
Total income tax		74,542.44
INCOME TAX LIABILITY		\$ 74,542.44
Victory tax net income, Schedule 4	\$117,556.17	
Less: Specific exemption	624.00	
Income subject to victory tax	<u>\$116,932.17</u>	
Victory tax before credit (5% of \$116,932.17)	5,846.61	
Less: Victory tax credit	<u>500.00</u>	
Net victory tax		<u>5,346.61</u>
Net income tax and victory tax		\$ 79,889.05
Income tax for 1942		\$ 32,034.05
1942 tax or 1943 tax, whichever is larger		\$ 79,889.05
Forgiveness feature:		
1942 tax or 1943 tax, whichever is smaller	\$32,034.05	
Amount forgiven (75% of \$32,034.05)	<u>24,025.54</u>	
Amount unforgiven		<u>8,008.51</u>
Total income and victory tax liability		\$ 87,897.56
Income and victory tax liability disclosed by return		<u>44,615.56</u>
Deficiency in income and victory tax		\$ 43,282.00

DEFENDANT'S PRE-TRIAL EXHIBIT No. 1
(Continued)

EXHIBIT A

Distribution of Partnership Income
of the Alaska Junk Company
Year 1942

Partnership income as disclosed by the deficiency notice and the Revenue Agent's Revised Statement dated February 3, 1947 \$236,123.45

Charitable Contributions as disclosed by the deficiency notice and the Revenue Agent's Revised Statement dated February 3, 1947 \$ 2,892.16

Distribution of Income and
Charitable Contributions

	<u>Interest</u>	<u>Salary</u>	<u>Ordinary Net Income</u>	<u>Total</u>	<u>Contributions</u>
Sam Schnitzer	25%	\$10,000	\$54,030.86	\$64,030.86	\$ 723.04
Rose Schnitzer	25%	----	54,030.86	54,030.86	723.04
Harry J. Wolf, Deceased	25%	10,000	54,030.86	64,030.86	723.04
Wennie Wolf, Deceased	25%	----	54,030.87	54,030.87	723.04
Totals		\$20,000	\$216,123.45	\$236,123.45	\$2,892.16

Year 1943

Partnership income as disclosed by the deficiency notice and the Revenue Agent's Revised Statement dated February 3, 1947 \$448,406.31

Charitable Contributions as disclosed by the deficiency notice and the Revenue Agent's Revised Statement dated February 3, 1947 \$ 3,924.33

Distribution of Income and
Charitable Contributions

	<u>Interest</u>	<u>Salary</u>	<u>Ordinary Net Income</u>	<u>Total</u>	<u>Contributions</u>
Sam Schnitzer	25%	\$10,000	\$107,101.57	\$117,101.57	\$981.08
Rose Schnitzer	25%	---	107,101.58	107,101.58	981.08
Harry J. Wolf, Deceased	25%	10,000	107,101.38	117,101.58	981.08
Wennie Wolf, Deceased	25%	---	107,101.58	107,101.58	981.08
Totals		\$20,000	\$428,406.31	\$448,406.31	\$3,924.33

Plaintiff's Contentions

Plaintiff contends as follows:

I.

That since the partnership reported its income on the accrual basis and the sales made to Oregon Electric Steel Rolling Mills were regarded by the partnership as bona fide sales and carried on the books as accounts receivable, the partnership was, as a matter of law, compelled to report the said sales as a part of its gross income and to include the same as gross income in reporting the distributive shares of the partners and in the net income of the partnership; that the partners were, as a matter of law, compelled to report in their individual income tax returns as income, the amount reported by the partnership as their distributive shares which included the income from the sales made to said Oregon Electric Steel Rolling Mills and the individual partners, including Harry J. Wolf, did include in his individual income tax return for the year 1943, his distributive share of the income of the partnership as it was reported by the partnership in its information return, which included income from the sales to Oregon Electric Steel Rolling Mills as aforesaid, and Harry J. Wolf paid the income taxes and victory taxes due thereon; that since the Commissioner of Internal Revenue disallowed the loss resulting from the failure of the Oregon Electric Steel Rolling Mills to pay said account receivable for the merchandise sold to it as aforesaid, and the Commissioner elected to treat

the delivery of the merchandise by the partnership to said corporation as a contribution to capital of the corporation, and determined a deficiency by reason of the disallowance of said bad debt loss deduction, and the Court affirmed the determination of the Commissioner, the payment of taxes on the portion of the income determined to be capital contribution, was erroneous and resulted in an overpayment in that the delivery of said merchandise by the partnership to the said corporation could not be sales and capital contributions at the same time, and since said delivery of merchandise would not constitute sales, it was improperly included in the net income and the taxes paid thereon were erroneously paid.

II.

This action to recover the taxes erroneously paid as aforesaid, is not barred by Section 322(c) of the Internal Revenue Code, but comes within the provision of Subdivision 2 of the exceptions to Section 322(c) of the Internal Revenue Code, in that the amount collected was in excess of the amount computed in accordance with the decision of the Board (Tax Court); that the claim for refund did not accrue until after the affirmance of the Commissioner's determination by the Courts and the payment of the deficiency determined thereby, and the Tax Court of the United States had no jurisdiction, referred to herein, to determine any refund, either in the original decision or in the judgment entered upon the computation under Rule 50.

III.

The judgment of the Tax Court of the United States is not *res adjudicata* in that the subject matter of the proceeding in the Tax Court of the United States was not the same as in this action and the proceedings in the two cases were between different parties. The Tax Court of the United States had no jurisdiction under the pleadings in that proceeding to determine the present claim for refund.

Defendant's Contentions

I.

This Action is Barred by Section 322(c) of the Internal Revenue Code of 1939.

The present suit involves the same tax for the same taxable year 1943 as was involved in the proceedings instituted by the plaintiff and related taxpayers before the Tax Court of the United States for redetermination of the deficiency in respect of their income tax for that taxable year.

Under the circumstances this action is barred by Section 322(c) of the Code. With certain exceptions not applicable here, the statute expressly provides that when a petition is filed with the Tax Court, which was the case here, no suit shall be instituted in any court for recovery of any part of "the tax for the taxable year" in respect of which the Commissioner of Internal Revenue has determined a deficiency.

The important thing with this statute is the fil-

ing of a petition in the Tax Court, rather than the decision of the Court. The taxpayer who elects to invoke the jurisdiction of the Tax Court must accept this consequence, and it is clear under the decided cases that the plaintiff has no right to sue the United States in this case.

II.

The Determination of the Tax Court Is Res Judicata

In the alternative, if this Court does not consider that Section 322(c) of the 1939 Code effectively bars this action, then it is barred by an application of the principles of res judicata. The same tax liability, the same tax year, and the same parties or their privies are involved in the instant suit as in the prior adjudication.

Upon hearing the same matter in the prior proceedings, the Tax Court decided the issues raised by the pleadings in favor of the Commissioner of Internal Revenue and promulgated its findings of fact and its opinion on July 14, 1949 (13 T.C. 43). The Court withheld entry of its final order and decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion.

The Commissioner filed his computation on October 6, 1949, showing a total liability of \$43,282.00 due and owing by the petition. Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, along with the other petitioners, had ample oppor-

tunity under Rule 50 to present his objections to the commissioner's computation of his tax liability in accordance with the Court's opinion.

Instead of objecting to the Commissioner's computation, Petitioner acquiesced on November 7, 1949, in the computation submitted to the Court by the Commissioner, and the Court entered its order and decision accordingly on November 9, 1949. This final order and decision, determining a deficiency of \$43,282.00 due and owing by said plaintiff, was affirmed on January 4, 1950, by the Court of Appeals for the Ninth Circuit (183 F.2d 70).

It is now too late, it is submitted, for the plaintiff and the other taxpayers to ask that any errors in the Rule 50 computation be corrected. The decision of the Tax Court which was affirmed by the Court of Appeals for this Circuit is a final decision which set at rest forever all questions litigated or which might have been litigated.

The plaintiff, it is submitted, has already clearly had his day in Court, and should not be permitted to relitigate the same issues in this Court, as a plain matter of justice and equity.

III.

Plaintiff's Recovery is Properly Denied on
Grounds of Estoppel.

In the alternative, if this Court does not consider that Section 322(c) and/or the principle of res judicata effectively barred this action, then it is contended that the plaintiff is estopped by the decision of the Tax Court and by his acquiescence in

the computation of the tax deficiency so ordered and decided by the Tax Court, as aforesaid, from any recovery herein.

Issues of Fact

I.

There are no issues of fact for determination.

Issues of Law

I.

Whether this action is barred by Section 322(c) of the Internal Revenue Code of 1939, because of the prior proceedings instituted before the Tax Court of the United States under the provisions of Section 272(a) of said Code?

II.

Whether, in the alternative, the decision of the Tax Court of the United States, affirmed by the Court of Appeals for the Ninth Circuit, is res judicata upon a suit for the recovery of any part of the tax paid in satisfaction of the deficiency in tax so determined in the Tax Court proceedings?

III.

Which of the computations set forth in paragraph XXV of this Pre-Trial Order is applicable under the circumstances in the event the Court shall determine that this action is not barred under Section 322(c) of the Internal Revenue Code of 1939

or by the principle of *res judicata*, that is, whether the amount of overpayment is \$41,608.89, as contended by the plaintiff, or \$24,955.82 as contended by the defendant?

Plaintiff's Exhibits

Plaintiff's Exhibit No. 1: Claim for Refund.

Defendant's Exhibits

Defendant's Exhibit No. 1: Computation, Acquiescence and Decision.

Joint Exhibits

Joint Exhibit No. 1: Transcript of the Record in Tax Court proceedings titled: "Sam Schnitzer et al v. Commissioner of Internal Revenue, Docket Nos. 14208, 14209, 14278, 14279, 14280, 14372.

Certain exhibits have been identified and received as pre-trial exhibits, the parties agreeing, with the approval of the Court, that no further identification of said exhibits is necessary and it is stipulated that said exhibits shall be received in evidence as a part of the stipulated facts.

The Parties hereto waive trial by jury and agree to the foregoing Pre-Trial Order and stipulate that this action shall be submitted to the Court for determination upon this Pre-Trial Order and the stipulated facts set forth therein.

The Court being fully advised in the premises;
now

Orders, that the foregoing Pre-Trial Order shall

not be amended except by consent of both Parties or to prevent manifest injustice; and it is further

Ordered, that this Pre-Trial Order supersedes all pleadings.

Dated at Portland, Oregon, this 28th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge

Approved:

/s/ A. J. Bischoff

/s/ R. S. Jacob

Attorneys for Plaintiff

/s/ C. E. Luckey

Attorney for Defendant

/s/ John D. Picco

Of Counsel for Defendant

[Endorsed]: Filed Feb. 28, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial, plaintiff appeared herein by S. J. Bischoff, his Attorney, the defendant appeared herein by C. E. Luckey, United States Attorney for the District of Oregon, and by John D. Picco, its attorneys; whereupon the cause was submitted to the Court upon a

stipulation of facts contained in the Pre-trial Order entered herein on the 28th day of February, 1955, and upon the exhibits described therein, briefs of the respective parties were submitted and argument made to the Court, the Court now makes and files herein the following:

Findings of Fact

The Court does hereby adopt, and makes as its findings of fact, all of the facts contained in the stipulation of the parties incorporated in the aforesaid Pre-trial Order as if herein fully and at length set forth.

Upon the aforesaid findings of fact, the Court does hereby make and file herein the following:

Conclusions of Law

I.

That the claim for refund filed by the plaintiff and described in the findings of fact is not barred by the provisions of Section 322(c) of the Internal Revenue Code and the Court has jurisdiction of this suit upon said claim by virtue of the exception No. 2 to Section 322(c) of the Internal Revenue Code.

II.

The plaintiff's cause of action is not barred by the principles of res judicata or collateral estoppel.

III.

In computing the amount of refund to which plaintiff is entitled, there should be eliminated the cost of merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the costs of sales reported in the original return should be reduced by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

IV.

Plaintiff is entitled to a judgment against the defendant for the sum of \$41,608.89 with interest thereon at the rate of 6% per annum from December 30, 1949, to the date of payment as required by law, together with his costs and disbursements incurred herein.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1955.

In the District Court of the United States for the
District of Oregon

Civil No. 7097

MONTE L. WOLF, Executor of the Estate of
Harry J. Wolf, deceased, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Upon the findings of fact and conclusions of law
duly made and filed herein, it is

Ordered and adjudged that the plaintiff Monte
L. Wolf, Executor of the Estate of Harry J. Wolf,
deceased, do have judgment for and recover of and
from The United States of America, the defendant
herein, the sum of \$41,608.89 with interest thereon
at the rate of 6% per annum from December 30,
1949, to date of payment as required by law, and
that plaintiff have judgment for his costs and dis-
bursements incurred herein in the sum of \$
as taxed by the Clerk of this Court.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, Plaintiff, and to Jacob, Jones & Brown and S. J. Bischoff, his Attorneys:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on August 19, 1955 in favor of plaintiff and against defendant.

Dated: October 14, 1955.

C. E. LUCKEY,
U. S. Attorney, District of Oregon.
/s/ VICTOR E. HARR,
Asst. U. S. Attorney,
Of Attorneys for Defendant.

[Endorsed]: Filed Oct. 14, 1955.

[Title of District Court and Cause.]

MOTION

Comes now defendant, by and through its attorneys, C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and moves the Court for

an order extending the time for filing the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit to ninety days from October 14, 1955, the date of filing of Notice of Appeal. This motion is based on the grounds that The Solicitor General requires additional time to consider said appeal fully.

Dated: November 9, 1955.

C. E. LUCKEY,

U. S. Attorney, District of Oregon.

/s/ VICTOR E. HARR,

Asst. United States Attorney.

[Endorsed]: Filed Nov. 10, 1955.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard ex parte upon motion of defendant for an order extending time for the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable The Solicitor General to have additional time to consider said appeal, and the Court being fully advised in the premises,

It is ordered that the time for filing the record on appeal and docketing the within action be and it is hereby extended to ninety days from October 14, 1955, the date of filing of the Notice of Appeal.

Dated at Portland, Oregon, this 14th day of November, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Nov. 14, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above-entitled Court:

Defendant designates the entire record, including this designation, to be forwarded to the United States Court of Appeals for the Ninth Circuit in the appeal of the above-entitled case.

Dated at Portland, Oregon, this 30th day of December, 1955.

C. E. LUCKEY,
U. S. Attorney for the District of
Oregon.

/s/ VICTOR E. HARR,
Asst. U. S. Attorney,
Of Attorneys for Defendant.

Certificate of Service attached.

[Endorsed]: Filed Dec. 30, 1955.

[Title of District Court and Cause.]

ORDER RELEASING EXHIBITS

This matter coming on upon motion of the defendants, and

It Appearing to the Court that Notices of Appeal from the judgments in the above entitled cases were filed by the defendants on 14th day of October, 1955, pursuant to Rule 73(a) of the Federal Rules of Civil Procedure, and that the exhibits entered upon the trial of the above entitled cases are necessary for a determination of this matter upon appeal.

It Is Therefore Ordered that all the exhibits introduced upon the trial of the above-entitled cases be forwarded to the Clerk of the United States Court of Appeals for the Ninth Circuit, together with the records in the above-entitled cases.

Dated this 30th day of December, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Dec. 30, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

July 31—Filed complaint.

Aug. 1—Issued summons to Marshal.

Aug 7—Filed summons with Marshal's return.

Oct. 5—Motion by Atty. Dressler for extension of time denied.—F.

Oct. 19—Filed def's motion to consolidate with Civ. 7098, 7099, 7100 and 7102.

Oct. 19—Filed def's motion to dismiss complaint.

Oct. 19—Entered order consolidating with Civ 7098 to 7102 inc.—McC.

Oct. 20—Filed above order.

Nov. 2—Record of hearing on motion US to dismiss and order reserving decision.

Dec. 2—Filed answer.

1954

July 2—Entered order setting for pretrial conference on Sept. 20, 1954 and for trial on Sept. 28, 1954.—McC.

Sept. 10—Entered order resetting for P.T.C. on Nov. 15, 1954 and for trial on Nov. 16, 1954.—McC.

Oct. 28—Entered order striking P.T.C. and trial dates.—McC.

Dec. 17—Entered order setting for pre-trial conference Jan. 31, 1955.—F.

1955

Jan. 5—Entered order setting for trial on Feb. 23, 1955.—S.

1955

Jan. 24—Filed stipulation for consolidation.

Feb. 16—Entered order setting for trial on March 1, 1955.—S.

Feb. 28—Filed Exhibit No. 1.

Feb. 28—Entered order allowing Pltf to April 1 and Deft to May 10 to file briefs and Pltf to June 1 to reply.—S.

Feb. 28—Filed and entered order of consolidation with Civ 7098-7099-7100-7101 and 7102 for trial.—S.

Feb. 28—Filed and entered pretrial order.—S.

Mar. 29—Filed Pltfs brief.

May 10—Entered order extending time 30 days to file brief of Deft.—S.

May 26—Entered order extending time to July 10, 1955 to file Defts brief. Filed.—McC.

July 8—Filed Def's brief.

July 14—Entered order setting for argument on July 25, 1955.—McC.

July 25—Record of argument on merits and submitted.—McC.

Aug. 19—Filed and entered findings of fact and conclusions of law.—McC.

Aug. 19—Filed and entered judgment.—McC.

Oct. 14—Filed Notice of Appeal by U. S. (copy mailed).

Nov. 10—Filed motion of U. S. for extension of time to file appeal.

Nov. 14—Filed and entered order allowing Deft 90 days from Oct. 14 to file and docket appeal.—McC.

1955

Dec. 30—Filed and entered order to forward exhibits.—McC.

Dec. 30—Filed designation of contents of record on appeal.

1956

Jan. 3—Filed reporter's transcript July 25, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Motion for consolidation; Defendant's motion to dismiss complaint; Order consolidating cases for hearing; Record of hearing on motion to dismiss complaint; Answer; Stipulation for entry of order consolidating actions for trial; Order consolidating cases for trial; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Motion for order extending time to docket appeal; Order extending time to docket appeal; Designation of contents of record on appeal; Order to forward exhibits and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7097, in which The United States of America

is the defendant and the appellant and Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

I further certify that there is enclosed herewith reporter's transcript and Joint Exhibit No. 1.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 24th day of January, 1956.

[Seal] R. DE MOTT,
 Clerk
 /s/ By THORA LUND,
 Deputy

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, July 25, 1955

Before: Honorable Claude McColloch, Chief Judge.

Appearances: Mr. S. J. Bischoff, of attorneys for plaintiffs. Mr. John Picco, Attorney, Internal Revenue Bureau, and Mr. Victor E. Harr, Assistant United States Attorney, of attorneys for defendant.

Mr. Bischoff: We are fortunate in this case to be able to submit the issues upon an agreed statement of facts. There is no issue of fact to be resolved, and the agreed facts upon which the issues of law depend are very few and simple.

(Thereupon counsel for the respective parties argued the above causes to the Court and thereafter the Court took the same under advisement.)

[Endorsed]: Filed January 3, 1956.

[Endorsed]: No. 15011. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Monte L. Wolf, Executor of the Estate of Harry J. Wolf, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: January 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15011

UNITED STATES OF AMERICA,

Appellant,

vs.

MONTE L. WOLF, Executor of the Estate of
Harry J. Wolf, Deceased, Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

The District Court erred in the following respects:

I.

In concluding and holding as a matter of law that the plaintiff was not barred from claiming a refund of the taxes involved in his suit.

II.

In concluding and holding as a matter of law that plaintiff's cause of action is not barred by the principles of *res judicata* or collateral estoppel.

III.

In the alternative, in that judgment in favor of the plaintiff was for an amount contrary to its Conclusion of Law No. III and contrary to the

stipulated facts contained in paragraphs XXIV, XXV and XXVI of the Pre-trial Order, which facts the District Court adopted and made as its Findings of Fact and which indicate that the judgment should not be more than the smaller amount set out in the aforesaid paragraphs of the Pre-Trial Order in the event its Conclusions of Law are sustained.

IV.

In not concluding and holding that refund of the amount involved is barred by Section 322 of the Internal Revenue Code of 1939.

V.

In not concluding and holding that the decision of the Tax Court of the United States published in 3 Tax Court Opinions 43 is *res judicata* and barred recovery in the District Court in respect to the income taxes paid by plaintiff for the same taxable years as were involved in the Tax Court proceeding.

VI.

In not concluding and holding that the plaintiff's cause of action is barred by the principles of *res judicata* and/or collateral estoppel.

VII.

In not entering judgment in defendant's favor and against the plaintiff.

Dated this 30th day of January, 1956, at Portland, Oregon.

C. E. LUCKEY,

U. S. Attorney for the District of
Oregon

/s/ VICTOR E. HARR,

Asst. U. S. Attorney

Certificate of Service by Mail attached.

[Endorsed]: Filed Feb. 2, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

MOTION TO CONSOLIDATE CASES FOR BRIEFS AND HEARING

Comes now the appellant, United States of America, by and through C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and moves the Court for an order of consolidation of the above-entitled cases for hearing and determination in the above-entitled Court, and further that a consolidated brief be permitted to be filed herein in respect to all of the above-entitled causes.

In support of this motion appellant represents that the said causes were consolidated for trial and determination in the court below and that the record submitted was considered by the Court as applicable to a determination of each of the said causes; that the said actions all grew out of a consolidated

proceeding before the Tax Court of the United States in the case of Sam Schnitzer et al. vs. Commissioner, 13 T.C. 43, and the decision of that Court in that proceeding.

Dated at Portland, Oregon this 1st day of February, 1956.

C. E. LUCKEY,

U. S. Attorney for the District of
Oregon

/s/ VICTOR E. HARR,

Asst. U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN,

United States Circuit Court Judge

/s/ WM. HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for
the Ninth Circuit

Certificate of Service by Mail attached.

[Endorsed]: Filed Feb. 6, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Causes.]

DESIGNATION OF THE RECORDS FOR
PRINTING AND MOTION TO WAIVE
PRINTING OF PART OF RECORDS

Appellant, United States of America, in accordance with Rule 17(6), Rules of the United States Court of Appeals for the Ninth Circuit, hereby designates for printing the following parts of the records in the above-entitled cases material to the consideration of the appeals and further moves as follows:

1. Designates for printing the entire record in the case of United States vs. Monte L. Wolf, Executor of the Estate of Harry J. Wolf, Deceased (No. 15,011), with the exception of Joint Exhibit No. 1.

2. Moves for an order that the record in the aforesaid case of United States vs. Monte L. Wolf, Executor of the Estate of Harry J. Wolf, Deceased (No. 15,011), shall also constitute the record in the case of United States vs. Manuel Schnitzer, Harold Schnitzer, Leonard Schnitzer, Executors of the Estate of Sam Schnitzer, Deceased (No. 15,015), and it shall be unnecessary to print the record in the said case (No. 15,015) with the exception only of the following portions of the record in said case (No. 15,015) which shall be printed:

- (a) Pre-trial order (excluding exhibits).
- (b) Findings of fact and conclusions of law.
- (c) Judgment order.
- (d) Notice of appeal.

3. Designates for printing the entire record in the case of United States vs. Monte L. Wolf, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,012), including all exhibits attached thereto save and except for Joint Exhibit No. 1.

4. Moves for an order that the record in the aforesaid case of United States vs. Monte L. Wolf, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,012), shall also constitute the record in the cases of United States vs. Blossom M. Grayson, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,013), and United States vs. Charlotte C. Cohon, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,014), and it shall be unnecessary to print the records in the said cases (No. 15,013 and No. 15,014) with the exception only of the following portions of the records in each of said cases (No. 15,013 and No. 15,014) which shall be printed respectively:

(a) Pre-trial orders in each of the cases (No. 15,013 and No. 15,014). (Excluding exhibits.)

(b) The findings of fact and conclusions of law in each of said cases (No. 15,013 and No. 15,014).

(c) The judgment orders in each of said cases (No. 15,013 and No. 15,014).

(d) Notice of appeal.

5. Moves that all of the records in the aforesaid cases, including Joint Exhibit No. 1, may be referred to by either party in briefs and/or argument, even though not designated for printing, as if the entire records in said cases had been printed.

6. Designates additionally for printing in the

printed records in United States vs. Monte L. Wolf, Executor of the Estate of Harry J. Wolf, Deceased (No. 15,011), and in United States vs. Monte L. Wolf, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,012), the following:

- (a) Statement of points upon which defendant-appellant intends to rely;
- (b) Motion and order for consolidation of these cases for briefing and hearing; and
- (c) This designation and order.

The undersigned states to the Court as the reason for not printing the complete records in cases numbered 15,013, 15,014 and 15,015 that the printing thereof would involve repetition of matter already included in cases numbered 15,011 and 15,012, respectively, and the undersigned further submits that the cost of printing Joint Exhibit No. 1 would be excessive.

Dated: February 24, 1956.

/s/ CHARLES K. RICE,
Acting Asst. Attorney General,
Attorney for Appellant

Certificate of Service attached.

[Endorsed]: Filed Feb. 27, 1956. Paul P. O'Brien,
Clerk.

No. 15012

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

MONTE L. WOLF, Transferee of the Estate of
Jennie Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

MAY 24 1956

PAUL P. O'BRIEN, CLERK

No. 15012

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

MONTE L. WOLF, Transferee of the Estate of
Jennie Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,

Asst. U. S. Attorney General,
Dept. of Justice, Washington, D. C.,

C. E. LUCKEY,

United States Attorney,

VICTOR E. HARR,

Asst. U. S. Attorney,
United States Courthouse,
Portland, Oregon,

For Appellant.

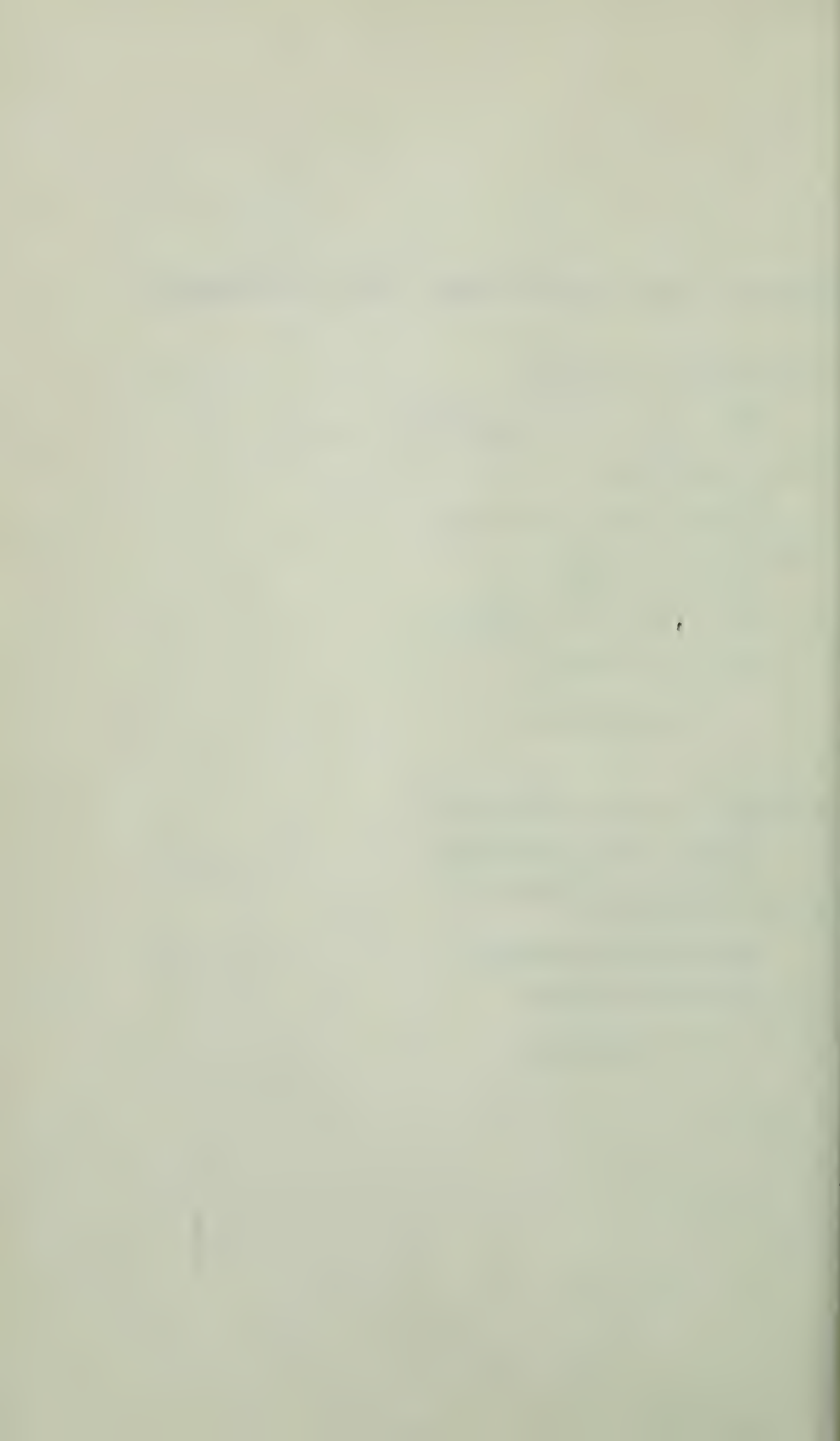
JACOB, JONES & BROWN,

Public Service Building,
Portland 4, Oregon, and

S. J. BISCHOFF,

902 Cascade Building,
Portland, Oregon,

For Appellee.



In the District Court of the United States for the
District of Oregon

Civil No. 7098

MONTE L. WOLF, Transferee of the Estate of
Jennie Wolf, deceased, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For cause of action against the defendant, plaintiff complains and alleges as follows:

I.

This is a civil action and arises under the laws of the United States of America providing for Internal Revenue, and jurisdiction rests upon Title 28, United States Code, Section 1340, and Title 28, United States Code, Section 1346.

II.

During the calendar years 1942 and 1943, and until her death on April 8, 1945, Jennie Wolf was a resident of the County of Multnomah, State of Oregon and was then and until her death a citizen of the United States of America.

III.

Plaintiff herein is the Transferee of the Estate of Jennie Wolf by virtue of the provisions of the

will of Jennie Wolf wherein her interest in the partnership, Alaska Junk Company, vested in her three children, the plaintiff herein, Charlotte C. Cohon and Blossom M. Grayson.

IV.

At all times from September 1, 1947, to and including October 30, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said Hugh H. Earle is no longer in office.

V.

At all times from July 17, 1933 to and including August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said James W. Maloney is no longer in office.

VI.

During all times mentioned herein the decedent, Jennie Wolf, kept her personal books and made and filed her income and victory tax returns on the cash receipts and disbursements and calendar year basis.

VII.

That during all times during the taxable years 1942 and 1943, the deceased, Jennie Wolf, was a member of a partnership known as Alaska Junk Company. Said partnership was comprised of the deceased, Jennie Wolf, Rose Schnitzer, Sam Schnitzer and Harry J. Wolf. Said partnership during

all times mentioned herein filed its partnership income tax information returns on a calendar year and accrual basis.

VIII.

For the calendar year 1942 Alaska Junk Company reported gross sales in the amount of \$2,038.76 on its partnership income tax information return filed on or about March 15, 1943. Included in said purported gross sales were certain items of merchandise delivered to a corporation known as Oregon Electric Steel Rolling Mills in the sum of \$243,975.86, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

IX.

The net income as reported on the information tax return of Alaska Junk Company for 1942 was in the amount of \$236,123.45, of which amount the deceased Jennie Wolf reported on her individual income and victory tax return the sum of \$54,030.86, said tax return being filed on or about March 15, 1943, and said Jennie Wolf paid said taxes to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

X.

For the calendar year 1943, Alaska Junk Company reported gross sales in the amount of \$1,463,365.76 on its partnership income tax information return filed on or about March 15, 1944. Included in said purported gross sales were certain items of merchandise delivered to a corporation known as

Oregon Electric Steel Rolling Mills in the sum of \$103,365.76, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

XI.

The net income as reported on the information tax return of Alaska Junk Company for the calendar year 1943 was in the amount of \$246,055.71, of which the deceased, Jennie Wolf, reported on her individual income and victory tax return the sum of \$56,513.93, said tax return being filed on or about March 15, 1944, and said Jennie Wolf paid said taxes on or before said date, to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

XII.

In computing the net income of Alaska Junk Company for the calendar year 1943, a loss was claimed on its income tax information return of \$202,350.60 for bad debts on account of the aforementioned merchandise delivered to Oregon Electric Steel Rolling Mills, the amount of which said items had theretofore been carried on the books of Alaska Junk Company as accounts receivable.

XIII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined that the aforementioned loss on account of merchandise delivered to Oregon Electric Steel Rolling Mills was in fact a capital contribution to said corporation and was not a proper bad debt deduction.

XIV.

On or about March 3, 1947, the Commissioner of Internal Revenue asserted a deficiency against plaintiff herein, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, by reason of the disallowance of the bad debt deduction that had been taken on the income tax return of Alaska Junk Company.

XV.

On June 2, 1947, the plaintiff, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, filed his petition with the Tax Court of the United States contending the determination of the Commissioner of Internal Revenue that said accounts receivable of Oregon Electric Steel Rolling Mills were in fact capital contributions was erroneous. Upon hearing the matter, the Tax Court of the United States affirmed the determination of the Commissioner of Internal Revenue and judgment was duly made and entered against the plaintiff, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, for one-third of the amount of \$42,273.99. Thereafter the plaintiff, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, paid the amount of said deficiency, together with interest on said amount, on the 31st day of December, 1949. Thereafter the plaintiff, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, prosecuted an appeal from the Tax Court's determination to the United States Court of Appeals for the Ninth Circuit, which Court duly entered its judgment affirming the determination of the Tax Court. Thereafter the plain-

tiff, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, petitioned the Supreme Court of the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals and which Court denied said petitions.

XVI.

On or about December 30, 1949, the plaintiff, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, paid the deficiency as asserted as aforesaid and reduced to judgment by the proceedings as aforesaid, to Hugh H. Earle, the then Collector of Internal Revenue for the District of Oregon, one-third of the additional tax in the sum of \$42,273.99, together with one-third of the interest on said deficiency in the sum of \$14,690.21.

XVII.

By reason of the income and victory tax payments made on the original return of the deceased, Jennie Wolf, and the payments made on account of the deficiencies asserted by the Commissioner of Internal Revenue, together with interest on said deficiencies, said taxpayer paid income and victory taxes, together with the interest on the deficiencies in the amount of \$93,915.17, for the taxable year 1943.

XVIII.

By virtue of the determination of the Commissioner of Internal Revenue, the judgment of the Tax Court of the United States, the affirmance of that judgment by the United States Court of Appeals and the denial of the petition for certiorari

by the United States Supreme Court as aforesaid, it has been duly adjudicated that the merchandise delivered by Alaska Junk Company to Oregon Electric Steel Rolling Mill were not sales but were capital contributions; that it was erroneously carried on the books of Alaska Junk Company as accounts receivable and was erroneously included in the gross income of the partnership in making said returns and the income and victory taxes paid by the partners on their distributive shares therefrom erroneously paid; that said amounts should have in fact been excluded from the gross income of said Alaska Junk Company thus reducing the amount of the net income reportable by said Alaska Junk Company, and thus reducing the amount of income reportable by the deceased, Jennie Wolf, on her individual income and victory tax return for the taxable year 1943.

XIX.

The difference in the amount of the income and victory tax of deceased, Jennie Wolf, as reported on her original income and victory tax return, together with the deficiency and interest as hereinabove set forth, and the correct amount of income and victory tax for the taxable year 1943, after eliminating from gross income of Alaska Junk Company the merchandise delivered to Oregon Electric Steel Rolling Mill, is \$43,738.35.

XX.

On or about June 20, 1951, the plaintiff, Monte L. Wolf, as Transferee of the Estate of Jennie

Wolf, filed with the Collector of Internal Revenue on Form 843 a claim for refund of one-third of the taxes and interest mentioned in the preceding paragraph, to-wit: \$43,738.35, together with interest as provided by law, a copy of which is attached hereto and by this reference made a part hereof and marked Exhibit A.

XXI.

On or about August 1, 1951, the Commissioner of Internal Revenue notified the plaintiff, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, by registered mail that his claim for refund had been disallowed.

XXII.

Said sum of \$43,738.35 has not been repaid to the decedent, Jennie Wolf, and/or the plaintiff herein, and the defendant now erroneously and illegally withholds from plaintiff one-third of the said sum of \$43,738.45, and the whole thereof, together with interest thereon at the rate of 6% per annum from December 31, 1949, as provided by law.

Wherefore, plaintiff demands judgment, upon the facts and law, against the defendant for the sum of \$14,579.45, together with interest from December 31, 1949, as provided by law.

/s/ JACOB, JONES & BROWN,
Attorneys for Plaintiff.

Of Counsel:

/s/ S. J. BISCHOFF

Duly Verified.

[Endorsed]: Filed July 31. 1953.

EXHIBIT A

CLAIM

To be filed with the Collector where assessment was made or tax paid.

The Collector will indicate in the block below the kind of claim filed, and fill in, where required, the certificate on the back of this form.

[x] Refund of Taxes Illegally, Erroneously, or Excessively Collected.

* * * * *

Name of taxpayer or purchaser of stamps: Monte L. Wolf, Transferee Estate of Jennie Wolf, Deceased.

Business address: 900 S. W. First Avenue, Portland, Oregon.

Residence: 3410 S. E. Woodstock, Portland, Oregon.

1. District in which return (if any) was filed: Oregon.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1942, to Dec. 31, 1943.

3. Character of assessment or tax: Income and Victory Taxes.

4. Amount of assessment, \$93,915.17; dates of payment 3/15/43 to 12/31/44 and 12/31/49.

* * * * *

6. Amount to be refunded plus interest as provided by law: \$14,579.45.

* * * * *

Exhibit A—(Continued)

The claimant believes that this claim should be allowed for the following reasons: See the attached schedule and statements.

I declare under the penalties of perjury that this claim (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is true and correct.

Dated: June 19th, 1951.

/s/ Monte L. Wolf, Transferee Estate
of Jennie Wolf, Deceased

MONTE L. WOLF, Transferee Estate of Jennie Wolf, Deceased

1942

INCOME

Dividend	\$.50	
Alaska Junk		54,030.86	\$54,031.36

DEDUCTIONS

Less $\frac{1}{4}$ Sales Alaska Junk Co. held by Tax Court to be Capital Contribution (\$243,975.86)			(60,993.96)
Loss			\$(6,962.60)
Donations	\$	723.04	
State Income Tax		3,496.81	

1943

INCOME

Dividend	\$.98	
Alaska Junk Co.		56,513.98	
One-fourth Alaska Junk loss disallowed (\$202,350.60)		50,587.65	\$107,102.61

Exhibit A—(Continued)

DEDUCTIONS

Capital Loss	\$ 1,000.00	
State Income Tax	1,879.07	
Contributions	981.09	
One-Fourth Alaska Junk Sales held by Tax Court to be Capital Contribution (\$103,365.76)	25,841.44	29,701.60
		<hr/>
		\$77,401.01
		<hr/>
Surtax		\$42,068.72
Normal Tax		4,576.24
Victory Tax		3,531.86
		<hr/>
		\$50,176.82
Tax paid on original return.....	\$36,950.97	
Additional tax paid 12/31/49.....	42,273.99	
Interest paid 12/31/49	14,690.21	
	<hr/>	
Total tax and interest.....		93,915.17
		<hr/>
Overpayment—Tax and Interest.....		\$43,738.35
		<hr/>
One-third by Monte L. Wolf, Transferee.....		\$14,579.45

Statement of Facts and Memorandum in Support of
Claims for Refund of Sam Schnitzer, Rose
Schnitzer, Estate of H. J. Wolf and Monte L.
Wolf, Charlotte C. Cohon and Blossom M.
Grayson Transferees of the Estate of Jennie
Wolf for the Tax Years 1942 and 1943:

The claimants and/or their predecessors in in-
terest were, in the tax years in question, members
of the partnership known as "Alaska Junk Com-
pany".

In said tax years the partnership consisted of
Sam Schnitzer, Rose Schnitzer, his wife, Harry J.

Exhibit A—(Continued)

Wolf and Jennie Wolf, his wife. Each owned a one-fourth interest in the partnership and received a one-fourth interest in the net earnings of the partnership. Jennie Wolf died April 8, 1945, and her interest in the partnership vested by virtue of her Will in her children, Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson in equal shares.

Harry J. Wolf died on the 6th day of February, 1948, and his interest in the said partnership vested by virtue of his will in Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson in equal shares.

The said partnership kept its books of account and reported its income and expenses in the tax years in question on the accrual basis.

The said partnership filed its income tax return for the tax year 1942 on or about March 15, 1943, and reported and filed its partnership information return on a calendar year basis. In said tax year it reported gross receipts from sales (on the accrual basis) of \$2,038,384.76. The net income of the partnership in said information return was computed upon that amount of gross sales, and the income tax returns of the individual partners were likewise computed upon the basis of that amount of gross sales.

Included in the said gross receipts of \$2,038,384.76 were sales made by the partnership to a corporation known as The Oregon Electric Steel Rolling Mills in the sum of \$243,975.86, all of which sales were accrued on the books of the partnership as of the end of the tax year 1942, were unpaid at

Exhibit A—(Continued)

that time, and were carried on the books of the partnership as accounts receivable.

The net income of the partnership for the tax year 1942, as reported in said information return, which included the sales made to The Oregon Electric Steel Rolling Mills, was the sum of \$236,123.45. The said net partnership income was reported by the individual partners in their individual income tax returns as constructively received, in the following amounts:

Sam Schnitzer	\$ 64,030.86
Rose Schnitzer	54,030.87
Harry J. Wolf	64,030.86
Jennie Wolf	54,030.86
<hr/>	
Total	\$236,123.45

The individual partners filed their income tax returns for said tax year on or about March 15, 1943, reporting said amounts in their respective income tax returns in determining the net taxable income of each and each paid income tax on the full amount of the net income so reported.

The said partnership filed its income tax returns for the tax year 1943 on or about March 15, 1944, and reported and filed its partnership information return on a calendar year basis. In said tax year it reported gross receipts from sales (on the accrual basis) of \$1,463,363.19, the net income of the partnership in said information return was computed upon that amount of gross sales, and the income tax returns of the individual partners were likewise

Exhibit A—(Continued)

computed upon the basis of that amount of gross sales.

Included in the said gross receipts of \$1,463,363.19 were sales made by the partnership to The Oregon Electric Steel Rolling Mills in the sum of \$103,365.76, all of which sales were accrued on the books of the partnership as of the end of the tax year 1943 and unpaid at that time, and the amount of said sales was carried on the books of the partnership as an account receivable.

That the net income of the partnership for the tax year 1943 as reported in said information return, which included the sales made to The Oregon Electric Steel Rolling Mills, was the sum of \$246,055.71. That the said net partnership income was reported by the individual partners of said Alaska Junk Company in their individual income tax returns as constructively received by said partners in 1943 in the following amounts:

Sam Schnitzer	\$ 66,513.92
Rose Schnitzer	56,513.93
Harry J. Wolf	66,513.93
Jennie Wolf	56,513.93

Total.....\$246,055.71

In computing the partnership net income for the tax year 1943 the partnership took as a deduction the sum of \$202,350.60, which included losses resulting from sales made by said partnership to The Oregon Electric Steel Rolling Mills in the sum of \$202,350.60, which amount had theretofore been car-

Exhibit A—(Continued)

ried on the books of the partnership as an account receivable, and which had been reported in the tax years 1942 and 1943 as income constructively received on the accrual basis, and included in the income for the said years by the individual partners as income constructively received and individual income and surtaxes were paid thereon.

On the 3rd day of March, 1947 the Commissioner of Internal Revenue determined and asserted income tax deficiencies against each of the four individual partners on the asserted ground that the merchandise sold by the partnership to The Oregon Electric Steel Rolling Mills, as well as advances made by the partnership to Oregon Electric and payments made by the partnership for the account of Oregon Electric, were in reality capital contributions by the partners to Oregon Electric and accordingly did not constitute sales, advances or payments for the account of Oregon Electric, and on said date of March 3rd, 1947, The Commissioner of Internal Revenue sent to the individual partners of the said partnership the 90-day notices of deficiencies imposed by reason thereof.

At the time the said deficiency letters were sent to the individual partners, the partner, Jennie Wolf, was dead; Mrs. Wolf left a Will devising one-third of her interest in the said partnership to each of her three children, Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson. Said will was duly admitted to probate in the Probate Department of the Circuit Court of the State of Ore-

Exhibit A—(Continued)

gon for Multnomah County and the decedent's interest in the said partnership was thereafter distributed to the said three legatees on the 1st day of April, 1946, and by virtue of said Will and the distribution the said three legatees became the owners of the decedent's partnership interest in the said partnership.

On June 2, 1947 petitions were filed with the Tax Court of the United States to review the determination of the Commissioner of Internal Revenue assessing said deficiencies by Sam Schnitzer, Harry J. Wolf and by Monte L. Wolf, Charlotte C. Cohon, Blossom M. Grayson as successors to the partnership interest of Jennie Wolf, deceased.

While said proceedings were pending before the Tax Court of the United States the death of the petitioner Harry J. Wolf occurred. He left a Will in which he devised his one-fourth interest in the Alaska Junk Company partnership to his three children, Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson, in equal shares; his Will was duly admitted to probate in the Circuit Court of the State of Oregon for Multnomah County, Probate Department, and in said proceeding Monte L. Wolf was appointed executor of his Estate, letters testamentary were duly issued to him as executor, he duly qualified as such executor, and has ever since been and now is the duly appointed, qualified and acting executor of the estate of said Harry J. Wolf, deceased; thereafter Monte L. Wolf as executor of the Estate of Harry J. Wolf, deceased, was sub-

Exhibit A—(Continued)

stituted as party petitioner in place and stead of the petitioner Harry J. Wolf in the said proceedings pending before the Tax Court of the United States.

Thereafter the said proceedings came on for trial in the Tax Court of the United States, and a judgment was duly made and entered therein adjudicating, among other things, that the sales of merchandise by said partnership of Alaska Junk Company to Oregon Electric Steel Rolling Mills in the tax years 1942 and 1943 did not constitute sales of merchandise and did not create any liabilities from Oregon Electric to the said partnership, but were, in reality, capital contributions by the partnership to Oregon Electric and losses sustained therefrom by the partnership in said tax years did not constitute deductible bad debt losses; based upon said determination, judgment was entered in the Tax Court of the United States on the 9th day of November, 1949 against each of the petitioners in said proceedings as follows:

Sam Schnitzer	\$ 43,287.42
Harry J. Wolf	43,282.00
Monte L. Wolf, Transferee Estate of	
Jennie Wolf, deceased	14,091.33
Charlotte C. Cohon, Transferee	
Estate of Jennie Wolf, deceased..	14,091.33
Blossom M. Grayson, Transferee Estate	
of Jennie Wolf, deceased	14,091.33

By reason of the fact the Commissioner of Internal Revenue determined Rose Schnitzer to be not a partner in Alaska Junk Company, no de-

Exhibit A—(Continued)

iciency was asserted against her until October 17, 1949, on which date a formal notice was sent based upon the decision of the Tax Court of the United States. In said notice he asserted a deficiency of \$42,273.99, which said deficiency, together with interest in the sum of \$14,795.90, was paid on January 14, 1950.

Thereafter and on the 31st day of December, 1949 each of the said petitioners paid to the Collector of Internal Revenue for the District of Oregon the amounts of the deficiencies determined against them, as aforesaid, together with interest as set forth in the schedules attached hereto.

Thereafter the said petitioners prosecuted an appeal from the said judgments of the Tax Court of the United States to the United States Court of Appeals for the Ninth Circuit; that thereafter judgments were entered in said court affirming the judgments of the Tax Court of the United States in said proceedings.

Thereafter the petitioners filed with the Supreme Court of the United States their petitions for Writs of Certiorari to review the judgments of the United States Court of Appeals in said proceedings, which said petitions were denied.

By reason of the premises the said judgments of the Tax Court of the United States have become and are now final. The portion of the deficiencies in income tax determined and assessed against Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson, as the successors to the partnership in-

Exhibit A—(Continued)

terest of Jennie Wolf, were paid by each of the said Monte L. Wolf, Charlotte C. Cohon and Blossom M. Grayson individually as transferees of the Estate of Jennie Wolf, deceased.

The portion of the deficiencies determined and assessed as against the Estate of Harry J. Wolf, deceased, was paid by Monte L. Wolf as executor of said estate.

By virtue of the income tax payments originally made for the tax years 1942 and 1943 when said tax returns were filed, plus the payments subsequently made by virtue of the aforesaid determinations and judgment, the total amount of income tax and interest payments that were made for said tax years by each of the four partnership interests were as follows:

Sam Schnitzer	\$103,006.54
Rose Schnitzer	94,020.86
Estate of Jennie Wolf	93,915.17
Estate of Harry J. Wolf.....	102,938.06

By virtue of the said determinations of the Commissioner and the judgments affirming the same referred to above, it now appears that the partnership erroneously included in the information tax return of Alaska Junk Company for said tax years the sales made by the partnership to the Oregon Electric Steel Rolling Mills as constructive receipts of income, and the partners in their respective individual tax returns erroneously included in their returns for said tax years the income resulting from the treatment of the sales from the partnership to

Exhibit A—(Continued)

Oregon Electric Steel Rolling Mills as accrued income.

By reason of the erroneous inclusion of the said sales as income in said tax years the claimants have now recomputed the net income of the partnership and their own distributive shares thereof for the tax years in question by eliminating therefrom the sales made by the partnership to Oregon Electric Steel Rolling Mills and the bad debt deduction disallowed by the Commissioner of Internal Revenue and accrued by the partnership as income in said tax years, as more fully appears by the amended tax returns, copies of which are attached hereto, which amended returns were prepared in accordance with the determinations of the Commissioner of Internal Revenue and of the judgments of the Tax Court of the United States affirmed as aforesaid, and by reason of said recomputation of the tax liability for said tax years the true tax liability for said tax years of each of the individuals owning partnership interests in said Alaska Junk Company is as follows:

Sam Schnitzer	\$56,800.93
Rose Schnitzer	50,176.80
Estate of Harry J. Wolf	56,969.72
Estate of Jennie Wolf	50,176.82

The difference between the total amounts of income tax and interest payments paid by the partners and their successors in interest, the claimants herein, and the amount of the tax liability of each of the partners and their successors in interest as

Exhibit A—(Continued)

computed in accordance with the amended return submitted herewith are as follows:

Sam Schnitzer	\$46,205.61
Rose Schnitzer	43,844.06
Estate of Harry Wolf	45,968.34
Monte L. Wolf, Transferee of Jennie Wolf, deceased	14,579.45
Charlotte C. Cohon, Transferee of Jennie Wolf, deceased	14,579.45
Blossom M. Grayson, Transferee of Jennie Wolf, deceased	14,579.45

In summary, these claims are predicated upon the facts that the partnership erroneously, as it now appears from the decisions of the Tax Court of the United States as affirmed, treated the sales to Oregon Electric Steel Rolling Mills as income from sales on its books and accrued the income therefrom, the individual partners were on account thereof required to and did report these sales as income constructively received by them and actually paid income and victory taxes thereon, although payment for said sales has never actually been received by the partnership and/or the individual partners, at the same time the Commissioner asserted, and it has now been judicially determined, that those sales were not sales but capital contributions, and the deduction taken as aforesaid by reason of the failure of Oregon Electric to pay said liabilities was disallowed, so that the claimants and their predecessors in interests paid income taxes on income which was never received actually or constructively.

EXHIBIT A (CONT.)

 LM 1085
 Department
 Service

UNITED STATES

Page 1

PARTNERSHIP RETURN OF INCOME 1942

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1942

or fiscal year beginning, 1942, and ending, 1943

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

ALASKA JUNK CO.

(Name)

900 S. W. First Avenue

(Street and number)

Portland, Multnomah, Oregon

(Post office)

(County)

(State)

Business or Profession Machinery, Pipe & Scrap Iron

Do Not Use These Spaces

File Code

Serial No.

District

(Date Received)

GROSS INCOME

Receipts from business or profession \$ 1,794,408 90

Cost of goods sold:

a) Inventory at beginning of year \$ 484,478 19

b) Merchandise bought for sale 1,001,686 90

c) Cost of ~~freight~~ freight 76,987 90

d) Total of lines (a), (b), and (c) \$ 2,563,152 99

e) Less inventory at end of year 231,312 65

Profit (or loss) from business or profession (item 1 minus item 2) \$ 1,331,840 34

f) (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):

n & Coast Railroad Liquidators, Portland, Oregon 2,410 12

g) Net on bank deposits, notes, etc.

h) Net on corporation bonds, etc. (except interest to

i) reported in item 7) \$

Less amortizable bond premium

j) Net on tax-free covenant bonds upon which a Federal

k) tax was paid at source \$

l) Net on Government obligations, etc.:

m) From line (h), Schedule A \$

n) From line (i), Schedule A \$

o) Net

p) Net (or loss) from sale or exchange of property other than capital assets (from Schedule B)

q) Net

r) Net income (state nature of income):

Total income in items 3 to 13 (enter nontaxable income in Schedules A and C) \$ 464,978 68

DEDUCTIONS

s) Salaries and wages (do not include compensation for partners) \$ 333,240 92

t) 13,637 58

u) Net on indebtedness (explain in Schedule F) 8,612 37

v) (explain in Schedule C) 17,228 07

w) By fire, storm, shipwreck, or other casualty, or theft (submit schedule)

x) Net (explain in Schedule D) 1,971 24

y) Depreciation (explain in Schedule E) 7,404 32

z) Amortization of emergency facilities (attach statement)

aa) Net on mines, oil and gas wells, timber, etc. (submit schedule)

ab) Deductions authorized by law (explain in Schedule F) 90,736 59

ac) Total deductions in items 15 to 24

ad) Ordinary net income (item 14 minus item 25) \$ 472,893 09

ae) Short-term capital gain (or loss) (from line 1, column 4, Summary, Schedule H) \$ (7,852 41)

af) Long-term capital gain (or loss) (from line 2, column 4, Summary, Schedule H) \$

other issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States Treasury or instrumentality thereof (enter amount of interest as item 8 (b), page 1) _____

Amount owned at end
of year

Interest received or accrued during the year (subject to normal tax and surtax)

3.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS.
(See Instruction 11)[illegible]

net gain (or loss) (enter as item 11, page 1)

fiduciary, or business relationship to you, if any, of purchaser of any of the above items:

use items were acquired by you other than by purchase, explain fully how acquired:

Schedule C.—TAXES. (See Instruction 19)

Nature	Amount
Omaha County Taxes	\$ 17,228 07
Total as item 19, page 1)	\$ 17,228 07

nter as item 19, page 1)

Schedule D.—BAD DEBTS. (See Instruction 21)

year	2. Net income reported		3. Sales on account		4. Bad debts charged off by organization if no reserve is carried on books		c If organization carried a reserve—			
							5. Gross amount added to reserve		6. Amount charged against reserve	
	\$ 137,520	73	\$ 1,525,059	74	\$ 11,340	05				
	141,599	08	1,727,425	79	5,211	60				
	254,126	38	1,705,335	29	5,226	20				
	236,123	45	1,815,566	91	1,971	24				

check whether deduction claimed represents worthless debts charged off ☐ or is an addition to a reserve ☐

Schedule E.—DEPRECIATION. (See Instruction 22 (a))

1. Description of property (if buildings, state which constructed)	2. Date acquired	3. Cost or other basis (do not include land or other nondepreciable property)	4. Assets fully depreciated in use at end of year	5. Depreciation allowed (or allowable) in prior years	6. Remaining cost or other basis to be recovered	7. Estimated life used in accumulating depreciation	8. Estimated remaining life from beginning of year	9. Depreciation allowable this year
		\$	\$	\$	\$			\$
			ATTACHED					
Enter as item 22(a), page 1)								\$

See as item 22(a), page 1)

Schedule F.—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 18 AND 24

2. Explanation	3. Amount	1. Item No. (continued)	2. Explanation (continued)	3. Amount (continued)
Interest paid on money borrowed - mostly to First National Bank, Portland, Oregon	\$ 8,612 37		Other deductions	\$90,736 59

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 29)

Name and address of organization	Amount
Community Chest - Portland, Oregon	650 00
Jewish Welfare Fund - Portland, Oregon	1,500 00
Service Organization - Portland, Oregon	50 00
St. Joseph's Paralysis Fund - Portland, Oregon	100 00
White Service Center, Portland, Oregon	50 00
W. L. Drive - Portland, Oregon	200 00
W. L. Drive	342 16
Total	2,892 16

al r in column 10, Schedule D.

EXHIBIT A (CONT.)

EXHIBIT A (CONT.)

1065
Department
on Service

UNITED STATES

Page 1

PARTNERSHIP RETURN OF INCOME 1943

(To be Filed Also by Syndicates, Pools, Joint Ventures, Etc.)

For Calendar Year 1943

or fiscal year beginning....., 1943, and ending....., 1944

(File this return not later than the 15th day of the 3d month following the close of the taxable year)

(PRINT PLAINLY NAME AND BUSINESS ADDRESS OF THE ORGANIZATION)

ALASKA JUNK CO. (Name)

900 S. W. First Avenue

Portland 4, Oregon

(City or Town)

(State)

Business or Profession Machinery, Pipe & Scrap Iron

Do Not Use These Spaces

File Code

Serial No.

District

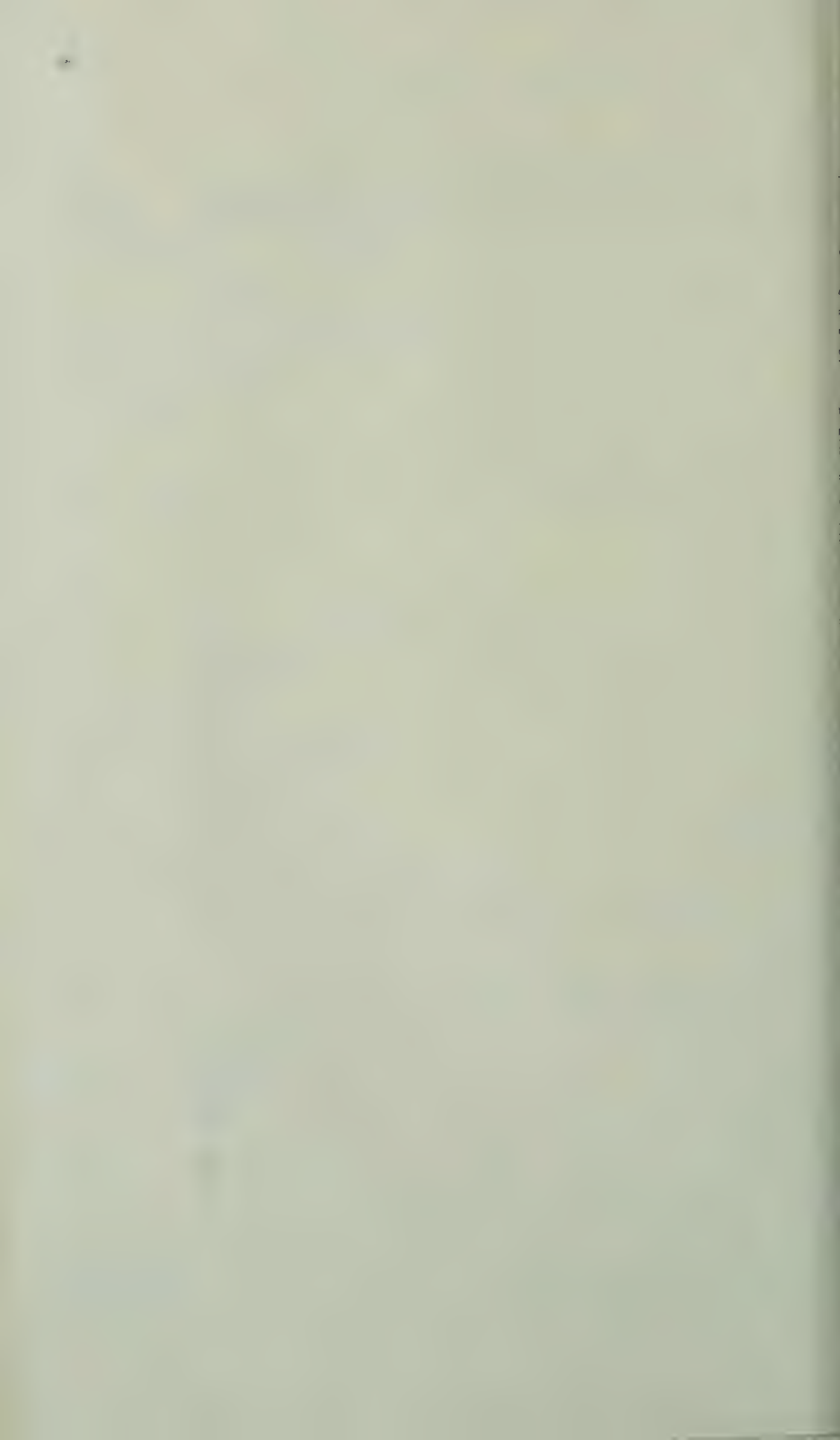
(Date Received)

GROSS INCOME

Receipts from business or profession			2,359,997	43
of goods sold:				
Inventory at beginning of year	\$ 231,312	65		
Merchandise bought for sale	582,811	29		
Cost of labor, supplies, etc.	45,857	93		
Total of lines (a), (b), and (c)	\$ 859,981	87		
Less inventory at end of year	338,319	68	521,662	19
Net (or loss) from business or profession (item 1 minus item 2)			\$ 838,335	24
Net (or loss) from other partnerships, syndicates, pools, etc. (State separately name, address, and amount):				
Bank deposits, notes, etc.			4,779	09
U.S. corporation bonds, etc. (except interest to be reported in item 7)	\$	\$		
Less amortizable bond premium				
U.S. tax-free covenant bonds upon which a Federal income tax has been paid at source	\$	\$		
U.S. Government obligations, etc.:				
U.S. Savings Bonds (line (h), Schedule A)	\$	\$		
U.S. Savings Bonds (line (i), Schedule A)	\$	\$		
Net (or loss) from sale or exchange of property other than capital assets (from Schedule B)			3	22
Net (state nature of income):				

DEDUCTIONS

Wages (do not include compensation for partners)	\$ 342,277	29
	11,887	08
	5,252	24
indebtedness (explain in Schedule F)	20,456	56
in Schedule C)	14,983	36
fire, storm, shipwreck, or other casualty, or theft (submit schedule)		
explain in Schedule D)	3,658	32
depreciation (explain in Schedule E)	6,596	33
ization of emergency facilities (attach statement)		
f mines, oil and gas wells, timber, etc. (submit schedule)		
ctions authorized by law (explain in Schedule F)	92,965	12
l deductions in items 15 to 24		
ary net income (item 14 minus item 25)	498,077	00
erm capital gain (or loss) (from line 1, column 4, Summary, Schedule HD)	\$345,040	55
erm capital gain (or loss) (from line 2, column 4, Summary, Schedule HD)	\$	



Schedule A.—INTEREST ON GOVERNMENT OBLIGATIONS, ETC. (See Instruction 8)

Page 2

1. Obligations or securities	2. Amount owned at end of year	3. Interest (and dividends subject to surtax only) received or accrued during the year
of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	\$	\$
issued prior to March 1, 1941, under Federal Farm Loan Act, or under such Act as amended		
of United States issued on or before September 1, 1917		
Notes issued prior to December 1, 1940, Treasury Bills and Treasury Certificates of Indebtedness issued prior to March 1, 1941		
United States Savings Bonds and Treasury Bonds issued prior to March 1, 1941		
of instrumentalities of the United States (other than obligations to be reported in (b) above) issued prior to March 1, 1941		
on share accounts in Federal savings and loan associations in case of shares issued prior to March 28, 1942	XXXXXXX	XXX
Total of lines (c), (f), and (g), column 3 (enter as item 8 (a), page 1)		\$
Notes issued on or after December 1, 1940, and obligations issued on or after March 1, 1941, by the United States	Amount owned at end of year	Interest received or accrued during the year (subject to normal tax and surtax)
Agency or instrumentality thereof (enter amount of interest as item 8 (b), page 1)	\$	\$

B.—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 11)

1. Kind of property	2. Date acquired	3. Gross sales price (contract price)	4. Cost or other basis	5. Expense of sale and cost of improvements subsequent to acquisition or March 1, 1913	6. Depreciation allowed (or allowable) since acquisition or March 1, 1913 (furnish details)	7. Gain or loss (column 3 plus column 6 minus the sum of columns 4 and 5)
Office fixtures	5/35	\$ 25.00	\$ 101.37	\$	\$ 82.81	\$ 6.44
Net gain (or loss) (enter as item 11, page 1)						\$ 3.22
Relationship, fiduciary, or business relationship to you, if any, of purchaser of any of the above items:	None					
How items were acquired by you other than by purchase, explain fully how acquired:						

Schedule C.—TAXES. (See Instruction 19)

Nature	Amount
Donah County, Property Taxes	\$ 13,931.88
Donah County, Property Taxes	993.28
Donah County, Property Taxes	58.20
(enter as item 19, page 1)	\$ 14,983.36

Schedule D.—BAD DEBTS. (See Instruction 21)

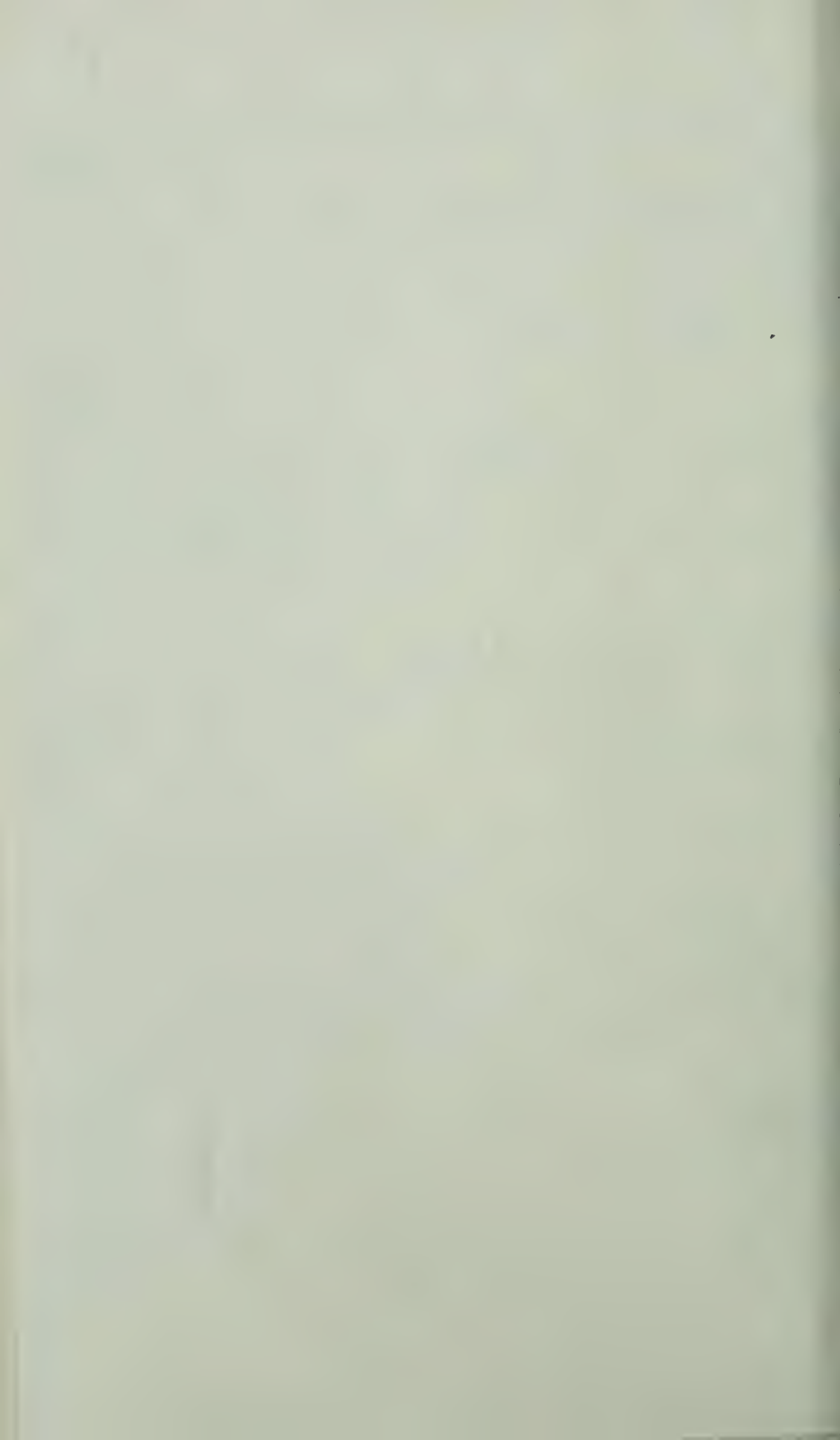
1. Calendar year	2. Net income reported	3. Sales on account	4. Bad debts of organization if no reserve is carried on books	If organization carried a reserve—	
				5. Gross amount added to reserve	6. Amount charged against reserve
	\$ 141,599.08	\$ 1,727,425.79	\$ 5,241.60	\$	\$
	254,126.38	1,705,335.29	5,226.20		
	236,123.45	1,815,566.91	1,971.24		
	246,055.71	1,208,709.91	206,008.92		

Check whether deduction claimed represents debts which have become worthless ☒ or is an addition to a reserve ☐.

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 29)

Name and address of organization	Amount
Donah Jewish Welfare	\$ 2,000.00
Donah War Chest	1,000.00
Donah Red Cross	250.00
Donahregation Sharie Torah	180.00
Donah Paralysis Fund	100.00
Donah Rehabilitation Fund	50.00
Donah Miscellaneous	344.33
Total (enter in column 10, Schedule J)	\$ 3,924.33

EXHIBIT A (CONT.)



[Title of District Court and Cause.]

DEFENDANT'S MOTION TO DISMISS
COMPLAINT

The defendant moves the Court to dismiss this action under Rule 12(b) of the Federal Rules of Civil Procedure, because the Court lacks jurisdiction of this action, in that it affirmatively appears from the face of the complaint that the Tax Court of the United States made and entered its decision in a proceeding instituted by the plaintiff, Monte L. Wolf, as transferee of the estate of Jennie Wolf, wherein that Court determined there was a deficiency in income tax due from the plaintiff as transferee of the estate of Jennie Wolf, for one-third of the amount of \$42,273.99 for the taxable year 1943; that thereafter the plaintiff, as transferee of the estate of Jennie Wolf, prosecuted an appeal from that Court's determination to the United States Court of Appeals for the Ninth Circuit which affirmed the judgment of the Tax Court; and that thereafter the Supreme Court of the United States denied plaintiff's petition for a writ of certiorari to review the judgment of the United States Court of Appeals. Therefore, the suit is barred by the provisions of Section 322(c) of the Internal Revenue Code, because the decision of the Tax Court has become final within the purview of Section 1140(b)(2) of that Code, and this Court lacks jurisdiction to review that decision under Section 1141 thereof.

The defendant also moves the Court to extend its time to answer the complaint until the decision on this motion.

October, 1953.

/s/ ROBERT L. DRESSLER,
Asst. United States Attorney

Acknowledgment of Service attached.

[Endorsed]: Filed October 19, 1953.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that a motion has been filed by the United States of America asking for an order of this Court to consolidate these actions for hearing and determination; and it further appearing that good cause exists therefor; it is hereby

Ordered that the above-entitled actions be and they are hereby consolidated for hearing and determination.

Dated this 19th day of October, 1953.

/s/ CLAUDE McCOLLOCH,
District Judge

[Endorsed]: Filed October 20, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

November 2, 1953

Plaintiff appearing by Mr. S. J. Bischoff, of counsel, and the defendant by Mr. Leland T. Ather-ton, Special Assistant to the Attorney General. Whereupon, this cause comes on to be heard upon the motion of the defendant to dismiss the complaint herein, and the Court having heard the arguments of counsel, reserves its decision.

[Title of District Court and Cause.]

ANSWER

Comes now the defendant United States of America, by Henry L. Hess, United States Attorney for the District of Oregon, and Robert L. Dressler, Assistant United States Attorney, and in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

For answer to the allegations contained in Paragraph I of the complaint, defendant denies that this Court has jurisdiction of this action because defendant is reliably informed and therefore believes that the plaintiff filed a timely petition with the Tax Court of the United States for the re-determination of a deficiency in income and victory tax assessed against him for the taxable year 1943 as

transferee of the Estate of Jennie Wolf in a proceeding bearing Docket No. 14278, and that the Tax Court on November 9, 1949, made and entered its decision that there was a deficiency in income and victory tax due from him for the calendar year 1943 in the amount of \$42,273.99, which decision has become final; and this action is therefore barred by the provision of Section 322 (c) of the Internal Revenue Code, and this Court lacks jurisdiction to review the Tax Court's decision, in accordance with the provisions of Section 1141 of the Internal Revenue Code.

II.

Admits the allegations contained in Paragraphs II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII and XIV of the complaint.

III.

Denies the allegations contained in Paragraphs XV, XVI and XVII of the complaint, except that defendant admits that plaintiff, as transferee of the Estate of Jennie Wolf, filed a petition with the Tax Court of the United States contending that the determination of the Commissioner of Internal Revenue that certain accounts receivables of Oregon Electric Steel Rolling Mills were in fact capital contributions was erroneous; and admits that the Tax Court affirmed the Commissioner's determination and entered a judgment against the plaintiff for the amount of \$42,273.99; and further admits that plaintiff prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit from the

Tax Court's decision, and that the Court of Appeals affirmed the Tax Court; and that the Supreme Court of the United States denied plaintiff's petition for a writ of certiorari.

IV.

Admits the allegations contained in Paragraph XVIII of the Complaint.

V.

Denies the allegations contained in Paragraph XIX of the complaint.

VI.

Admits the allegations contained in Paragraphs XX and XXI of the complaint.

VII.

Denies the allegations contained in Paragraph XXII of the complaint except that defendant admits that no part of the sum of \$43,738.35 referred to thereon has been repaid to the decedent, Jennie Wolf, or to the plaintiff herein.

VIII.

For a first, separate and complete defense, defendant avers that this Court lacks jurisdiction of the subject matter of this action under the provisions of Internal Revenue Code, Section 1141 (a); and that this suit is barred by the provisions of Internal Revenue Code, section 322 (c), because (1) the plaintiff in this cause, timely filed a petition with the Tax Court of the United States in a proceeding bearing docket No. 14278 for the re-

determination of the deficiency in income and victory tax for the calendar year 1943, asserted against him by the Commissioner of Internal Revenue, which that Court affirmed in its opinion promulgated July 14, 1949; and

(2) pursuant to that opinion the respondent filed a computation on October 6, 1949, and the petitioner, the plaintiff herein, on November 7, 1949, filed an acquiescence in the computation filed by the respondent, whereupon the Tax Court on November 9, 1949, entered its decision wherein it ordered and decided that there was a deficiency in income and victory tax due from Monte L. Wolf, the plaintiff herein, for the calendar year 1943 in the amount of \$42,273.99, which has not been reversed or modified, and has become final and satisfied.

IX.

For a second, separate and complete defense, defendant further avers that the complaint fails to state a claim upon which relief can be granted, because defendant is reliably informed and therefore believes that in a proceeding heretofore had in the Tax Court of the United States, in which Monte L. Wolf, the plaintiff herein, was the petitioner, and the Commissioner of Internal Revenue was respondent, bearing Docket No. 14278, it was, among other things, alleged in the petition that the Commissioner's determination that certain accounts receivable of Oregon Electric Steel Rolling Mills for merchandise delivered to it by Alaska Junk Company were capital contributions, was erroneous; and that, upon

hearing the matter, the Tax Court affirmed the Commissioner's determination, and duly entered its decision that there was due from Monte L. Wolf a deficiency in income and victory tax for the calendar year 1943 in the amount of \$42,273.99 which was paid by him, that he prosecuted an appeal from the Tax Court's decision to the United States Court of Appeals for the Ninth Circuit which duly affirmed the Tax Court's decision; and the United States Supreme Court thereafter denied his petition for a writ of certiorari; and the Tax Court's decision stands unreversed and unmodified, and has become final and satisfied, and avers that the matters and things above set forth, which were determined, adjudged and decreed in that decision were and are res judicata between the plaintiff and the defendant, in this cause, under the provisions of Internal Revenue Code, section 3772 (d).

X.

For a third, separate and complete defense, defendant further avers, upon information and belief, that Monte L. Wolf, the plaintiff herein, on November 7, 1949, filed with the Tax Court of the United States an acquiescence in the computation filed on October 6, 1949 by the respondent with that Court showing a deficiency in income and victory tax for the calendar year 1943 in the amount of \$42,273.99, pursuant to the opinion of that court promulgated on July 14, 1949, in the proceeding bearing Docket No. 14278, instituted by him for the re-determination of the deficiency in income and

victory tax for that calendar year, asserted by the Commissioner of Internal Revenue against him and that accordingly on November 9, 1949, the Tax Court duly entered its decision in that proceeding, wherein it was ordered and decided that there was a deficiency in income and victory tax due from him for the calendar year 1943 in the amount of \$42,273.99, and defendant further avers upon information and belief, that said decision of the Tax Court has not been reversed or modified, and has become final and satisfied, wherefore defendant avers that said decision or judgment of the Tax Court is a bar to this action and conclusive not only as to matters actually presented but as to every ground of recovery that might have been presented; and that plaintiff is estopped by that decision and his acquiescence in the computation of the amount of the tax deficiency so ordered and decided by the Tax Court from any recovery herein.

Wherefore, Defendant prays that the complaint herein be dismissed and that judgment be entered in its favor and against the plaintiff, together with costs and disbursements of this action.

HENRY L. HESS,

U. S. Attorney for the District of
Oregon

/s/ ROBERT L. DRESSLER,

Asst. United States Attorney

[Endorsed]: Filed December 2, 1953.

[Title of District Court and Cause.]

STIPULATION FOR THE ENTRY OF AN
ORDER CONSOLIDATING THE ABOVE
ENTITLED ACTIONS FOR TRIAL

It is hereby stipulated by and between the parties hereto, by their respective Counsel, that all of the above entitled actions be consolidated for trial for the reason that the basic issues of law and fact in the above entitled actions are the same and the right of the plaintiffs in said actions to recover will depend upon the determination of the same basic issues of law and fact.

It is further stipulated that all exhibits that may be offered and/or admitted in evidence upon the consolidated trial of said actions, shall be deemed to have been offered and admitted in each of said cases and shall be deemed a part of the record in each of the said cases without the necessity of filing copies of said exhibits in all of said cases.

It is further stipulated, subject to the approval of the Court, that an Order may be entered upon this stipulation without further notice.

Dated: January 24, 1955.

/s/ S. J. BISCHOFF,

Attorney for Plaintiffs

/s/ C. E. LUCKEY,

Attorney for Defendant

[Endorsed]: Filed January 24, 1955.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

At this time the above entitled cause came on for pre-trial before the undersigned Judge of the above entitled Court. Plaintiff appeared herein by S. J. Bischoff, his Attorney. Defendant appeared herein by and through C. E. Luckey and as its Attorney.

The following are the agreed facts:

I.

During the calendar years 1942 and 1943, and until her death on April 8, 1945, Jennie Wolf was a resident of the County of Multnomah, State of Oregon, and was then and until her death, a citizen of The United States of America.

II.

Jennie Wolf was a partner in the partnership of Alaska Junk Company during said years, having a one-fourth interest in said partnership, which partnership interest continued until the date of her death; that plaintiff is the transferee of the estate of Jennie Wolf, deceased, by virtue of the provisions of the will of Jennie Wolf wherein her interest in the said partnership vested in her three children, the plaintiff herein, and Charlotte C. Cohon and Blossom M. Grayson, each of them acquiring a one-third in said partnership interest of said Jennie Wolf, deceased.

III.

At all the times from September 1, 1947, to and including October 31, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Revenue for the District of Oregon and the said Hugh H. Earle is no longer in office and was not in office at the time of the commencement of this action.

IV.

At all the times from July 17, 1933, to and including August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon and the said James W. Maloney is no longer in office and was not in office at the time of the commencement of this action.

V.

During all the times mentioned herein, the decedent Jennie Wolf kept her personal books and made and filed her income and victory tax returns on the cash receipts and disbursements and calendar year basis.

VI.

During the taxable years 1942 and 1943, while said Jennie Wolf was a member of said partnership of Alaska Junk Company, the said partnership kept its books of account and filed its partnership income tax information returns on a calendar year and accrual basis.

VII.

For the calendar year 1942, Alaska Junk Company reported gross sales in the amount of \$2,038,384.76 on its partnership income tax information return filed on or about March 15, 1943. Included in said gross sales, were certain sales of merchandise made and delivered to a corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$243,975.86, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

VIII.

The net income, as reported on the information tax return of Alaska Junk Company for 1942, was in the amount of \$236,123.45 of which amount, the deceased, Jennie Wolf, reported on her individual income and victory tax return the sum of \$54,030.86, said tax return being filed on or before March 15, 1943, and the said Jennie Wolf paid the said taxes due thereon to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

IX.

For the calendar year 1943, Alaska Junk Company reported gross sales in the amount of \$1,463,365.76 on its partnership income tax information return filed on or before March 15, 1944. Included in said gross sales, was merchandise sold and delivered to the said corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$103,365.76, the amount of said item being carried on

the books of said Alaska Junk Company as an account receivable.

X.

The net income as reported on the information tax return of the Partnership Alaska Junk Company for the calendar year 1943 in the amount of \$246,055.71 of which the deceased Jennie Wolf reported on her individual income and victory tax return, the sum of \$56,613.93, said tax return being filed on or before March 15, 1944, and said Jennie Wolf paid the taxes due thereon on or before said date to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

XI.

In computing the net income of Alaska Junk Company for the calendar year 1943, a loss was claimed on its income tax information return of \$202,350.60 for bad debts on account of the aforementioned merchandise sold and delivered to said Oregon Electric Steel Rolling Mills, the amount of which said items had theretofore been carried on the books of the Alaska Junk Company as accounts receivable.

XII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined that the aforementioned loss on account of merchandise sold and delivered to Oregon Electric Steel Rolling Mills constituted a capital contribution to said Corporation and was, therefore, not a proper bad debt deduction.

XIII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined a deficiency in income and victory tax for the calendar year 1943 against plaintiff herein, Monte L. Wolf, as Transferee of the Estate of Jennie Wolf, by reason of the disallowance of the said bad debt deduction that had been taken on the information tax return of Alaska Junk Company.

XIV.

On June 2, 1947, the plaintiff, Monte L. Wolf, as transferee of the Estate of Jennie Wolf, filed his petition with The Tax Court of the United States in Docket No. 14278 contending that the determination of the Commissioner of Internal Revenue, to the effect that said accounts receivable of the Oregon Electric Steel Rolling Mills were in fact capital contributions, was erroneous. Upon hearing the matter, the Tax Court of the United States determined the issues in favor of the Commissioner of Internal Revenue and promulgated its finding of fact and opinion on July 14, 1949.

The Court withheld entry of its decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion. The Commissioner filed his computation on October 6, 1949, showing a total liability of \$42,273.99 due and owing by the transferees of the Estate of Jennie Wolf, deceased. On November 7, 1949, the plaintiff Monte L. Wolf, as one of

the transferees of the Estate of Jennie Wolf, filed his acquiescence in the computation submitted by the Commissioner. Thereafter, on November 9, 1949, the Court entered its final order and decision determining a deficiency on the part of the plaintiff Monte L. Wolf, as transferee of the Estate of Jennie Wolf, in income and victory tax for the calendar year 1943, for one-third of the amount of \$42,273.99, being the amount of the deficiency assessed against the three transferees of Jennie Wolf by reason of the said determination.

Thereafter, on January 4, 1950, the plaintiff Monte L. Wolf, as transferee of the Estate of Jennie Wolf, prosecuted an appeal from the decision of The Tax Court of the United States Court of Appeal for the Ninth Circuit. The Ninth Circuit rendered a per curiam opinion under date of July 24, 1950, affirming the decision of the Tax Court. On October 30, 1950, the plaintiff Monte L. Wolf as transferee of the Estate of Jennie Wolf, petitioned the Supreme Court of the United States for a writ of certiorari to review the judgment of the Court of Appeals. The Supreme Court denied certiorari on January 2, 1951 (340 U.S. 911).

The parties stipulate that the findings of fact and the opinion of the Tax Court and the per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit are to be considered as part of the evidence and record before this Court; that said findings of fact and opinions are reported in the report of the Tax Court proceedings entitled *Sam Schnitzer, et al vs. Commissioner of Internal Rev-*

enue at 13 T.C. 43, and in the report of the Court of Appeals proceeding of the same name at 183 F. 2d, 70; and that said reports are hereby incorporated and made a part of this stipulation.

XV.

On December 30, 1949, plaintiff Monte L. Wolf, as transferee of the Estate of Jennie Wolf, paid the deficiency asserted as aforesaid and determined by the said judgment, to Hugh H. Earle, the then Collector of Internal Revenue for the District of Oregon, the amount so paid by plaintiff being \$14,-091.33, being one-third of the total of the deficiency determined as against the three transferees of Jennie Wolf, deceased.

XVI.

By reason of the income and victory tax payments made on the original return of Jennie Wolf and the payments made on account of the deficiencies determined by the Commissioner of Internal Revenue and affirmed by The Tax Court of the United States as aforesaid, together with the interest on said deficiencies, the said taxpayer and her three transferees paid income and victory taxes, together with the interest on the deficiencies, in the amount of \$93,915.17 for the taxable year 1943.

XVII.

By virtue of the determination of the Commissioner of Internal Revenue, the decision of the Tax Court of the United States, the affirmance of that decision by the Court of Appeals for the Ninth Circuit and the denial of the petition for certiorari by

the United States Supreme Court, as aforesaid, it has been adjudicated in effect that the merchandise sold and delivered by Alaska Junk Company to Oregon Electric Steel Rolling Mills were not sales but capital contributions.

As a result of said adjudication, it follows that the "sales" to Oregon Electric Steel Rolling Mills were erroneously carried on the books of the Alaska Junk Company as accounts receivable; they were erroneously included in the gross income of the partnership for 1942 and 1943; the income and victory taxes paid by the partners including Jennie Wolf on their distributive shares therefrom under the original returns, were erroneously paid; and the amounts of such "sales" should have been excluded from the gross income of Alaska Junk Company, thus reducing the amount of the net income reportable by said Alaska Junk Company, and thus reducing the amount of income reportable by the deceased, Jennie Wolf, on her individual income and victory tax return for the taxable year 1943.

XVIII.

On or about June 21, 1951, plaintiff Monte L. Wolf, as transferee of the Estate of Jennie Wolf, filed with the Collector of Internal Revenue for the District of Oregon, on Form 843, a claim for refund of one-third of tax and interest, to-wit, one-third of the sum of \$43,738.35, together with interest thereon as provided by law, a copy of which claim is attached to the complaint herein. It is stipulated that the copy of the claim attached to the

complaint herein is a true and correct copy of the claim filed as aforesaid and may be marked and admitted as "Plaintiff's Pre-trial Exhibit No. 1".

XIX.

On or about August 1, 1951, the Commissioner of Internal Revenue notified the plaintiff, as transferee of the Estate of Jennie Wolf, by registered mail, that his said claim for refund had been disallowed.

XX.

That the said sum of \$43,738.35 has not been repaid to the decedent Jennie Wolf and/or her transferees and/or the plaintiff herein.

XXI.

In its returns for the years 1942 and 1943, the partnership, Alaska Junk Company, reported sales, costs of sales, gross profits, other incomes, total incomes, deductions and net incomes as follows:

	1942	1943
Sales.....	\$ 2,038,384.76	\$ 1,463,363.19
Cost of Sales.....	1,331,840.34	521,662.19
	<hr/>	<hr/>
Gross profits.....	\$ 706,544.42	\$ 941,701.00
Other income.....	2,410.12	4,782.31
	<hr/>	<hr/>
Total Income.....	\$ 708,954.54	\$ 946,483.31
Deductions.....	(a) 472,831.09	(a) 700,427.60
	<hr/>	<hr/>
Net income.....	\$ 236,123.45	\$ 246,055.71

(a) Total deductions claimed for 1942 and 1943 included bad debts in the respective amounts of \$1,971.24 and \$206,008.92.

XXII.

In computing the amount of the refund claimed by the plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff eliminated the merchandise sold and delivered to Oregon Electric Steel Rolling Mills in the amount of \$243,-975.86 and \$103,365.76 from the gross sales reported in the original returns of the partnership, as aforesaid, thus computing the refund on the basis of gross sales in the amount of \$1,794,408.90 and \$1,359,997.43 for the years 1942 and 1943, respectively.

XXIII.

In computing the amount of refund claimed by plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff used the same cost of sales reported in the original returns of the partnership, that is, \$1,331,840.34 and \$521,662.19 for the years 1942 and 1943, respectively. The plaintiff did not eliminate the cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, that is, plaintiff did not reduce the cost of sales as reported in the original returns of the partnership by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

XXIV.

The parties stipulate that the merchandise sold and delivered to Oregon Electric Steel Rolling Mills for the years 1942 and 1943, the amounts of which have been excluded from gross income in comput-

ing the refund claimed by the plaintiff, had a cost of \$159,389.43 and \$36,849.89, respectively.

XXV.

The difference in the amount of income and victory tax of the deceased, Jennie Wolf, as reported on her original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for the taxable year 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, is the sum of \$39,075.29.

The difference in the amount of income and victory tax of the deceased, Jennie Wolf, as reported on her original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the cost of said merchandise, is the sum of \$24,487.71.

The parties stipulate that the above computations are true and correct and that in the event the Court shall determine that the prosecution of this action is not barred by Section 322(e) of the Internal Revenue Code of 1939, or by the principle of *res adjudicata*, and/or the doctrine of collateral estoppel, the judgment to be entered in favor of the plaintiff and the other two transferees of the Estate

of Jennie Wolf, deceased, shall be in accordance with and for the amount of overpayment shown in whichever of the above computations is determined by the Court to be applicable under the circumstances, to-wit:

One-third of \$39,075.29 or \$13,025.09 for each of said transferees; or

One-third of \$24,487.71 or \$8,162.57 for each of said transferees,

as the case may be; (plus interest as provided by law).

XXVI.

That in the computation submitted by the Commissioner of Internal Revenue on October 6, 1949, pursuant to Rule 50 of the Tax Court's Rules of Practice, as indicated in paragraph XIV above, the amount of sales which the Tax Court concluded were capital contributions were not eliminated from the gross sales as originally reported by the partnership, nor was the cost of such sales eliminated from the cost of goods sold as originally reported by said partnership. That the plaintiff, as transferee of Jennie Wolf, deceased, on November 7, 1949, filed his acquiescence in the computation submitted by the Commissioner of Internal Revenue, and that on November 9, 1949, the Tax Court entered its final order and decision in the matter. A true and correct copy of said computation, acquiescence and decision is attached hereto, and it is stipulated that the same may be admitted in evidence and marked as "Defendant's Pre-Trial Exhibit 1".

XXVII.

The Tax Court proceedings entitled "Sam Schnitzer et al v. Commissioner of Internal Revenue", Docket Nos. 14208, 14209, 14278, 14279, 14280 and 14372, reported in 13 T.C. 43, are as shown and contained in the transcript of record No. 12471, which transcript accompanied the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It is stipulated by the parties that said transcript is a true and correct copy of the pleadings, findings of fact, opinion and decision of the Tax Court in said proceedings, and pertinent testimony and evidence adduced therein, together with the petition for review and per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit. It is further stipulated that said copy of the transcript of the Tax Court proceedings as aforesaid may be marked and admitted in evidence as "Joint Pre-Trial Exhibit No. 1".

Defendant's Pre-Trial Exhibit No. 1

The Tax Court of the United States
Washington

Docket No. 14278

Monte L. Wolf, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Decision

Pursuant to Opinion of the Tax Court promulgated July 14, 1949, the respondent filed a computa-

tion on October 6, 1949, and the petitioner, on November 7, 1949, filed an acquiescence in the computation as filed by the respondent. Now, therefore, it is

Ordered and Decided: That there is a deficiency in income and victory tax due from this petitioner for the calendar year 1943 in the amount of \$42,-273.99.

/s/ Luther A. Johnson, Judge

Entered: Nov. 9, 1949.

[Title of Tax Court and Cause No. 14278.]

Respondent's Computation for Entry of Decision

The attached proposed computation is submitted, on behalf of the respondent, to The Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Tax Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Tax Court, pursuant to the statutes in such cases made and provided.

/s/ Charles Oliphant, Chief Counsel,
Bureau of Internal Revenue

(Of Counsel:

Wilford H. Payne, Division Counsel,

John H. Pigg, Leonard A. Marcussen, Special
Attorneys, Bureau of Internal Revenue

JHP:ajs 9-21-49

C:TS:W WD-Recomp.
P:LAM:MWM

AUDIT STATEMENT

In re: Monte L. Wolf, Transferee,
Estate of Jammie Wolf, Deceased, Transferor,
3410 S. E. Woodstock Boulevard
Portland, Oregon

Docket No. 14278

Tax Liability for the Taxable Year Ended December 31, 1943.

	<u>Deficiency</u>
Income and Victory Tax	\$42,273.99

Recomputation of tax liability prepared in accordance with the
Opinion of The Tax Court of the United States promulgated July 14,
1949.

Year 1943

Schedule 1

	<u>Income Tax</u>	<u>Victory Tax</u>
Net income as disclosed by the deficiency notice dated March 4, 1947	\$103,242.40	\$107,102.56
As adjusted, based on the Opinion of The Tax Court of the United States promulgated July 14, 1949	No Change	No Change
Transferee liability for income and Victory tax (No Change)		\$79,224.96
Income and Victory tax liability disclosed by the return, Account #353534, Oregon District		<u>36,950.97</u>
Deficiency in income and Victory tax		\$42,273.99

Plaintiff's Contentions

Plaintiff contends as follows:

I.

That since the partnership reported its income on the accrual basis and the sales made to Oregon Electric Steel Rolling Mills were regarded by the partnership as bona fide sales and carried on the books as accounts receivable, the partnership was, as a matter of law, compelled to report the said sales as a part of its gross income and to include the same as gross income in reporting the distributive shares of the partners and in the net income of the partnership; that the partners were, as a matter of law, compelled to report in their individual income tax returns as income, the amount reported by the partnership as their distributive shares which included the income from the sales made to said Oregon Electric Steel Rolling Mills and the individual partners, including Jennie Wolf, did include in her individual income tax return for the year 1943, her distributive share of the income of the partnership as it was reported by the partnership in its information return, which included income from the sales to Oregon Electric Steel Rolling Mills as aforesaid, and Jennie Wolf paid the income taxes and victory taxes due thereon; that since the Commissioner of Internal Revenue disallowed the loss resulting from the failure of the Oregon Electric Steel Rolling Mills to pay said account receivable for the merchandise sold to it as aforesaid, and the Commissioner elected to treat

the delivery of the merchandise by the partnership to said corporation as a contribution to capital of the corporation, and determined a deficiency by reason of the disallowance of said bad debt loss deduction, and the Court affirmed the determination of the Commissioner, the payment of taxes on the portion of the income determined to be capital contribution, was erroneous and resulted in an overpayment in that the delivery of said merchandise by the partnership to the said corporation could not be sales and capital contributions at the same time, and since said delivery of merchandise would not constitute sales, it was improperly included in the net income and the taxes paid thereon were erroneously paid.

II.

This action to recover the taxes erroneously paid as aforesaid, is not barred by Section 322(c) of the Internal Revenue Code, but comes within the provision of Subdivision 2 of the exceptions to Section 322(c) of the Internal Revenue Code, in that the amount collected was in excess of the amount computed in accordance with the decision of the Board (Tax Court); that the claim for refund did not accrue until after the affirmance of the Commissioner's determination by the Courts and the payment of the deficiency determined thereby, and the Tax Court of the United States had no jurisdiction, referred to herein, to determine any refund, either in the original decision or in the judgment entered upon the computation under Rule 50.

III.

The judgment of the Tax Court of the United States is not *res adjudicata* in that the subject matter of the proceeding in the Tax Court of the United States was not the same as in this action and the proceedings in the two cases were between different parties. The Tax Court of the United States had no jurisdiction under the pleadings in that proceeding to determine the present claim for refund.

Defendant's Contentions

I.

This Action is Barred by Section 322(c) of the Internal Revenue Code of 1939.

The present suit involves the same tax for the same taxable year 1943 as was involved in the proceedings instituted by the plaintiff and related taxpayers before the Tax Court of the United States for redetermination of the deficiency in respect of their income tax for that taxable year.

Under the circumstances this action is barred by Section 322(c) of the Code. With certain exceptions not applicable here, the statute expressly provides that when a petition is filed with the Tax Court, which was the case here, no suit shall be instituted in any court for recovery of any part of "the tax for the taxable year" in respect of which the Commissioner of Internal Revenue has determined a deficiency.

The important thing with this statute is the fil-

ing of a petition in the Tax Court, rather than the decision of the Court. The taxpayer who elects to invoke the jurisdiction of the Tax Court must accept this consequence, and it is clear under the decided cases that the plaintiff has no right to sue the United States in this case.

II.

The Determination of the Tax Court Is Res Judicata

In the alternative, if this Court does not consider that Section 322(c) of the 1939 Code effectively bars this action, then it is barred by an application of the principles of res judicata. The same tax liability, the same tax year, and the same parties or their privies are involved in the instant suit as in the prior adjudication.

Upon hearing the same matter in the prior proceedings, the Tax Court decided the issues raised by the pleadings in favor of the Commissioner of Internal Revenue and promulgated its findings of fact and its opinion on July 14, 1949 (13 T.C. 43). The Court withheld entry of its final order and decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion.

The Commissioner filed his computation on October 6, 1949, showing a total liability of \$42,273.99 due and owing by the transferees of the Estate of Jennie Wolf, deceased. The plaintiff, one of the transferees of said Estate, along with the other

transferees, had ample opportunity under Rule 50 to present their objections to the Commissioner's computation of their tax liability in accordance with the Court's opinion.

Instead of objecting to the Commissioner's computation, plaintiff and the other transferees of the Estate of Jennie Wolf, deceased, acquiesced on November 7, 1949, in the computation submitted to the Court by the Commissioner, and the Court entered its order and decision accordingly on November 9, 1949. This final order and decision, determining a deficiency of \$42,273.99 due and owing by said Estate, was affirmed on January 4, 1950, by the Court of Appeals for the Ninth Circuit (183 F.2d 70).

It is now too late, it is submitted, for the plaintiff and the other taxpayers to ask that any errors in the Rule 50 computation be corrected. The decision of the Tax Court which was affirmed by the Court of Appeals for this Circuit is a final decision which set at rest forever all questions litigated or which might have been litigated.

The plaintiff, it is submitted, has already clearly had his day in Court, and should not be permitted to relitigate the same issues in this Court, as a plain matter of justice and equity.

III.

Plaintiff's Recovery is Properly Denied on Grounds of Estoppel.

In the alternative, if this Court does not consider that Section 322(c) and/or the principle of res

judicata effectively barred this action, then it is contended that the plaintiff is estopped by the decision of the Tax Court and by his acquiescence in the computation of the tax deficiency so ordered and decided by the Tax Court, as aforesaid, from any recovery herein.

Issues of Fact

I.

There are no issues of fact for determination.

Issues of Law

I.

Whether this action is barred by Section 322(c) of the Internal Revenue Code of 1939, because of the prior proceedings instituted before the Tax Court of the United States under the provisions of Section 272(a) of said Code?

II.

Whether, in the alternative, the decision of the Tax Court of the United States, affirmed by the Court of Appeals for the Ninth Circuit, is res judicata upon a suit for the recovery of any part of the tax paid in satisfaction of the deficiency in tax so determined in the Tax Court proceedings?

III.

Which of the computations set forth in paragraph XXV of this Pre-Trial Order is applicable under

the circumstances in the event the Court shall determine that this action is not barred under Section 322(c) of the Internal Revenue Code of 1939 or by the principle of *res judicata*, that is, whether the amount of overpayment is \$39,075.29, as contended by the plaintiff and the other transferees of the Estate of Jennie Wolf, deceased, or \$24,487.71 as contended by the defendant?

Plaintiff's Exhibits

Plaintiff's Exhibit No. 1: Claim for Refund.

Defendant's Exhibits

Defendant's Exhibit No. 1: Computation, Acquiescence and Decision.

Joint Exhibits

Joint Exhibit No. 1: Transcript of the Record in Tax Court proceedings titled: "Sam Schnitzer et al v. Commissioner of Internal Revenue, Docket Nos. 14208, 14209, 14278, 14279, 14280, 14372.

Certain exhibits have been identified and received as pre-trial exhibits, the parties agreeing, with the approval of the Court, that no further identification of said exhibits is necessary and it is stipulated that said exhibits shall be received in evidence as a part of the stipulated facts.

The Parties hereto waive trial by jury and agree to the foregoing Pre-Trial Order and stipulate that this action shall be submitted to the Court for determination upon this Pre-Trial Order and the stipulated facts set forth therein.

The Court being fully advised in the premises;
now

Orders, that the foregoing Pre-Trial Order shall not be amended except by consent of both Parties or to prevent manifest injustice; and it is further

Ordered, that this Pre-Trial Order supersedes all pleadings.

Dated at Portland, Oregon, this 28th day of February, 1955.

vs. GUS J. SOLOMON,

Judge

Approved:

s/ S. J. Bischoff

s/ R. S. Jacob

Attorneys for Plaintiff

s/ C. E. Luckey

Attorney for Defendant

s/ John D. Picco

Of Counsel for Defendant

[Endorsed]: Filed Feb. 28, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial, plaintiff appeared herein by S. J. Bischoff, his Attorney, the defendant appeared herein by C. E.

Luckey, United States Attorney for the District of Oregon, and by John D. Pisco, its attorneys; whereupon the cause was submitted to the Court upon a stipulation of facts contained in the Pre-trial Order entered herein on the 28th day of February, 1955, and upon the exhibits described therein, briefs of the respective parties were submitted and argument made to the Court, the Court now makes and files herein the following:

Findings of Fact

The Court does hereby adopt, and makes as its findings of fact, all of the facts contained in the stipulation of the parties incorporated in the aforesaid Pre-trial Order as if herein fully and at length set forth.

Upon the aforesaid findings of fact, the Court does hereby make and file herein the following:

Conclusions of Law

I.

That the claim for refund filed by the plaintiff and described in the findings of fact is not barred by the provisions of Section 322(c) of the Internal Revenue Code and the Court has jurisdiction of his suit upon said claim by virtue of the exception to Section 322(c) of the Internal Revenue Code.

II.

The plaintiff's cause of action is not barred by the principles of *res judicata* or collateral estoppel.

III.

In computing the amount of refund to which plaintiff is entitled, there should be eliminated the cost of merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the costs of sales reported in the original return should be reduced by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

IV.

Plaintiff is entitled to a judgment against the defendant for the sum of \$13,025.09 with interest thereon at the rate of 6% per annum from December 30, 1949, to the date of payment as required by law, together with his costs and disbursements incurred herein.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1955.

In the District Court of the United States for the
District of Oregon

Civil No. 7098

MONTE L. WOLF, Transferee of the Estate of
Jennie Wolf, Deceased, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Upon the findings of fact and conclusions of law
duly made and filed herein, it is

Ordered and Adjudged that the plaintiff Monte L.
Wolf, Transferee of the Estate of Jennie Wolf, de-
ceased, do have judgment for and recover of and
from The United States of America, the defendant
herein, the sum of \$13,025.09 with interest thereon
at the rate of 6% per annum from December 30,
1949, to date of payment as required by law, and
that plaintiff have judgment for his costs and dis-
bursements incurred herein in the sum of \$.
as taxed by the Clerk of this Court.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Monte L. Wolf, Transferee of the Estate of Jennie Wolf, Deceased, Plaintiff, and to Jacob, Jones & Brown and S. J. Bischoff, his Attorneys:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on August 19, 1955 in favor of plaintiff and against defendant.

Dated: October 14, 1955.

C. E. LUCKEY,
U. S. Attorney, District of Oregon
/s/ VICTOR E. HARR,
Asst. U. S. Attorney,
Of Attorneys for Defendant

[Endorsed]: Filed October 14, 1955.

[Title of District Court and Cause.]

MOTION

Comes now defendant, by and through its attorneys, C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and moves the Court for

an order extending the time for filing the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit to ninety days from October 14, 1955, the date of filing of Notice of Appeal. This motion is based on the grounds that The Solicitor General requires additional time to consider said appeal fully.

Dated: November 9, 1955.

C. E. LUCKEY,

U. S. Attorney, District of Oregon.

/s/ VICTOR E. HARR,

Asst. United States Attorney.

[Endorsed]: Filed Nov. 10, 1955.

[Title of District Court and Cause.]

ORDER

This matter coming on to be heard *ex parte* upon motion of defendant for an order extending time for the filing of the record on appeal and docketing the within action in the United States Court of Appeals for the Ninth Circuit, to enable The Solicitor General to have additional time to consider said appeal, and the Court being fully advised in the premises,

It is ordered that the time for filing the record on appeal and docketing the within action be and it is hereby extended to ninety days from October 14, 1955, the date of filing of the Notice of Appeal.

Dated at Portland, Oregon, this 14th day of November, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

[Endorsed]: Filed Nov. 14, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above-entitled Court:

Defendant designates the entire record, including this designation, to be forwarded to the United States Court of Appeals for the Ninth Circuit in the appeal of the above-entitled case.

Dated at Portland, Oregon, this 30th day of December, 1955.

C. E. LUCKEY,

U. S. Attorney for the District of
Oregon.

/s/ VICTOR E. HARR,

Asst. U. S. Attorney,

Of Attorneys for Defendant.

Certificate of Service attached.

[Endorsed]: Filed Dec. 30, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

1953

July 31—Filed complaint.

Aug. 1—Issued summons to Marshal.

Aug 7—Filed summons with Marshal's return.

Oct. 5—Motion by Atty. Dressler for extension of time denied.—F.

Oct. 19—Filed def's motion to consolidate with Civ. 7097, 7099, 7100, 7101 and 7102.

Oct. 19—Filed def's motion to dismiss complaint.

Oct. 19—Entered order consolidating with Civ 7097 and 7099 to 7102 inc.—McC.

Oct. 20—Filed above order.

Nov. 2—Record of hearing on motion US to dismiss and order reserving decision.—McC.

Dec. 2—Filed answer.

1954

July 2—Entered order setting for pretrial conference on Sept. 20, 1954 and for trial on Sept. 28, 1954.—McC.

Sept. 10—Entered order resetting for P.T.C. on Nov. 15, 1954 and for trial on Nov. 18, 1954.—McC.

Oct. 28—Entered order striking P.T.C. and trial dates.—McC.

Dec. 17—Entered order setting for pre-trial conference Jan. 31, 1955.—F.

1955

Jan. 5—Entered order setting for trial on Feb. 23, 1955.—S.

1955

Jan. 24—Filed stipulation for consolidation.

Feb. 16—Entered order setting for trial on March 1, 1955.—S.

Feb. 28—Entered order allowing Pltf to April 1 and Deft to May 10 to file briefs and Pltf to June 1 to reply.—S.

Feb. 28—Filed and entered order of consolidation with Civ 7097-7099-7100-7101 and 7102 for trial.—S.

Feb. 28—Filed and entered pretrial order.—S.

Mar. 29—Filed Pltfs brief.

May 10—Entered order extending time 30 days to file Govts. Brief.—S.

May 26—Entered order extending time to July 10, 1955 to file Defts brief. Filed.—McC.

July 8—Filed Def's brief.

July 25—Record of arguments on merits and submitted.—McC.

Aug. 19—Filed and entered findings of fact and conclusions of law.—McC.

Aug. 19—Filed and entered judgment.—McC.

Oct. 14—Filed Notice of Appeal by U. S. (copy mailed).

Nov. 10—Filed motion of U. S. for extension of time to file appeal.

Nov. 14—Filed and entered order allowing Deft 90 days from Oct. 14 to file and docket appeal.—McC.

Dec. 30—Filed and entered order to forward exhibits.—McC.

1955

Dec. 30—Filed designation of contents of record on appeal.

1956

Jan. 3—Filed reporter's transcript July 25, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Defendant's motion to dismiss complaint; Order consolidating cases for hearing; Record of hearing on motion to dismiss complaint; Answer; Stipulation for entry of order consolidating actions for trial; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Motion for order extending time to docket appeal; Order extending time to docket appeal; Designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7098, in which The United States of America is the defendant and the appellant and Monte L. Wolf, Transferee of the estate of Jennie Wolf, deceased is the plaintiff and appellee; that the said record has been prepared by me in

accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 24th day of January, 1956.

[Seal]

R. DE MOTT,

Clerk.

/s/ By THORA LUND,

Deputy.

[Endorsed]: No. 15012. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Monte L. Wolf, Transferee of the Estate of Jennie Wolf, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: January 26, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15012

UNITED STATES OF AMERICA, Appellant,
vs.

MONTE L. WOLF, Transferee of the Estate of
JENNIE WOLF, Deceased, Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY

The District Court erred in the following respects:

I.

In concluding and holding as a matter of law that the plaintiff was not barred from claiming a refund of the taxes involved in his suit.

II.

In concluding and holding as a matter of law that plaintiff's cause of action is not barred by the principles of res judicata or collateral estoppel.

III.

In the alternative, in that judgment in favor of the plaintiff was for an amount contrary to its Conclusion of Law No. III and contrary to the stipulated facts contained in paragraphs XXIV, XXV and XXVI of the Pre-Trial Order, which facts the District Court adopted and made as its Findings of Fact and which indicate that the judgment should not be more than the smaller amount set out in the aforesaid paragraphs of the Pre-

Trial Order in the event its Conclusions of Law are sustained.

IV.

In not concluding and holding that refund of the amount involved is barred by Section 322 of the Internal Revenue Code of 1939.

V.

In not concluding and holding that the decision of the Tax Court of the United States published in 3 Tax Court Opinions 43 is res judicata and barred recovery in the District Court in respect to the income taxes paid by plaintiff for the same taxable years as were involved in the Tax Court proceeding.

VI.

In not concluding and holding that the plaintiff's cause of action is barred by the principles of res judicata and/or collateral estoppel.

VII.

In not entering judgment in defendant's favor and against the plaintiff.

Dated this 30th day of January, 1956, at Portland, Oregon.

C. E. LUCKEY,

United States Attorney for the District of Oregon.

/s/ VICTOR E. HARR,

Assistant United States Attorney.

Affidavit of Service by mail attached.

[Endorsed]: Filed Feb. 2, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Causes 15011, 15012, 15013, 15014, 15015.]

**MOTION TO CONSOLIDATE CASES FOR
BRIEFS AND HEARING**

Comes now the appellant, United States of America, by and through C. E. Luckey, United States Attorney for the District of Oregon, and Victor E. Harr, Assistant United States Attorney, and moves the Court for an order of consolidation of the above-entitled cases for hearing and determination in the above-entitled Court, and further that a consolidated brief be permitted to be filed herein in respect to all of the above-entitled causes.

In support of this motion appellant represents that the said causes were consolidated for trial and determination in the court below and that the record submitted was considered by the Court as applicable to a determination of each of the said causes; that the said actions all grew out of a consolidated proceeding before the Tax Court of the United States in the case of Sam Schnitzer et al. vs. Commissioner, 13 T.C. 43, and the decision of that Court in that proceeding.

Dated at Portland, Oregon this 1st day of February, 1956.

C. E. LUCKEY,

U. S. Attorney for the District of
Oregon

/s/ VICTOR E. HARR,

Asst. U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN,
United States Circuit Court Judge

/s/ WM. HEALY,

/s/ WALTER L. POPE,
Judges, U. S. Court of Appeals for
the Ninth Circuit

Certificate of Service by Mail attached.

[Endorsed]: Filed Feb. 6, 1956. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Causes.]

**DESIGNATION OF THE RECORDS FOR
PRINTING AND MOTION TO WAIVE
PRINTING OF PART OF RECORDS**

Appellant, United States of America, in accordance with Rule 17(6), Rules of the United States Court of Appeals for the Ninth Circuit, hereby designates for printing the following parts of the records in the above-entitled cases material to the consideration of the appeals and further moves as follows:

1. Designates for printing the entire record in the case of United States vs. Monte L. Wolf, Executor of the Estate of Harry J. Wolf, Deceased (No. 15,011), with the exception of Joint Exhibit No. 1.

2. Moves for an order that the record in the aforesaid case of United States vs. Monte L. Wolf,

Executor of the Estate of Harry J. Wolf, Deceased (No. 15,011), shall also constitute the record in the case of United States vs. Manuel Schnitzer, Harold Schnitzer, Leonard Schnitzer, Executors of the Estate of Sam Schnitzer, Deceased (No. 15,015), and it shall be unnecessary to print the record in the said case (No. 15,015) with the exception only of the following portions of the record in said case (No. 15,015) which shall be printed:

- (a) Pre-trial order (excluding exhibits).
- (b) Findings of fact and conclusions of law.
- (c) Judgment order.
- (d) Notice of appeal.

3. Designates for printing the entire record in the case of United States vs. Monte L. Wolf, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,012), including all exhibits attached thereto save and except for Joint Exhibit No. 1.

4. Moves for an order that the record in the aforesaid case of United States vs. Monte L. Wolf, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,012), shall also constitute the record in the cases of United States vs. Blossom M. Grayson, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,013), and United States vs. Charlotte C. Cohon, Transferee of the Estate of Jennie Wolf, Deceased (No. 15,014), and it shall be unnecessary to print the records in the said cases (No. 15,013 and No. 15,014) with the exception only of the following portions of the records in each of said cases (No. 15,013 and No. 15,014) which shall be printed respectively:

(a) Pre-trial orders in each of the cases (No. 15,013 and No. 15,014). (Excluding exhibits.)

(b) The findings of fact and conclusions of law in each of said cases (No. 15,013 and No. 15,014).

(c) The judgment orders in each of said cases (No. 15,013 and No. 15,014).

(d) Notice of appeal.

5. Moves that all of the records in the aforesaid cases, including Joint Exhibit No. 1, may be referred to by either party in briefs and/or argument, even though not designated for printing, as if the entire records in said cases had been printed.

6. Designates additionally for printing in the printed records in *United States vs. Monte L. Wolf, Executor of the Estate of Harry J. Wolf, Deceased* (No. 15,011), and in *United States vs. Monte L. Wolf, Transferee of the Estate of Jennie Wolf, Deceased* (No. 15,012), the following:

(a) Statement of points upon which defendant-appellant intends to rely;

(b) Motion and order for consolidation of these cases for briefing and hearing; and

(c) This designation and order.

The undersigned states to the Court as the reason for not printing the complete records in cases numbered 15,013, 15,014 and 15,015 that the printing thereof would involve repetition of matter already included in cases numbered 15,011 and 15,012, respectively, and the undersigned further submits that the cost of printing Joint Exhibit No. 1 would be excessive.

Dated: February 24, 1956.

/s/ CHARLES K. RICE,
Acting Asst. Attorney General,
Attorney for Appellant

Certificate of Service attached.

[Endorsed]: Filed Feb. 27, 1956. Paul P. O'Brien,
Clerk.



No. 15013

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

BLOSSOM M. GRAYSON, Transferee of the Es-
tate of Jennie Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

MAY 24 1956

PAUL P. O'BRIEN, CLERK

No. 15013

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

BLOSSOM M. GRAYSON, Transferee of the Es-
tate of Jennie Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,

Asst. U. S. Attorney General,

Dept. of Justice, Washington, D. C.,

C. E. LUCKEY,

United States Attorney,

VICTOR E. HARR,

Asst. U. S. Attorney,

United States Courthouse,

Portland, Oregon,

For Appellant.

JACOB, JONES & BROWN,

Public Service Building,

Portland 4, Oregon, and

S. J. BISCHOFF,

902 Cascade Building,

Portland, Oregon,

For Appellee.

In the District Court of the United States for the
District of Oregon

Civil No. 7099

BLOSSOM M. GRAYSON, Transferee of the Es-
tate of Jennie Wolf, deceased, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

PRE-TRIAL ORDER

At this time the above entitled cause came on for pre-trial before the undersigned Judge of the above entitled Court. Plaintiff appeared herein by S. J. Bischoff, her Attorney. Defendant appeared herein by and through C. E. Luckey and as its Attorney.

The following are the agreed facts:

I.

During the calendar years 1942 and 1943, and until her death on April 8, 1945, Jennie Wolf was a resident of the County of Multnomah, State of Oregon, and was then and until her death, a citizen of The United States of America.

II.

Jennie Wolf was a partner in the partnership of Alaska Junk Company during said years, having a one-fourth interest in said partnership, which partnership interest continued until the date of her

death; that plaintiff is the transferee of the estate of Jennie Wolf, deceased, by virtue of the provisions of the will of Jennie Wolf wherein her interest in the said partnership vested in her three children, the plaintiff herein, and Monte L. Wolf and Charlotte C. Cohen, each of them acquiring a one-third in said partnership interest of said Jennie Wolf, deceased.

III.

At all the times from September 1, 1947, to and including October 31, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Revenue for the District of Oregon and the said Hugh H. Earle is no longer in office and was not in office at the time of the commencement of this action.

IV.

At all the times from July 17, 1933, to and including August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon and the said James W. Maloney is no longer in office and was not in office at the time of the commencement of this action.

V.

During all the times mentioned herein, the decedent Jennie Wolf kept her personal books and made and filed her income and victory tax returns on the cash receipts and disbursements and calendar year basis.

VI.

During the taxable years 1942 and 1943, while said Jennie Wolf was a member of said partnership of Alaska Junk Company, the said partnership kept its books of account and filed its partnership income tax information returns on a calendar year and accrual basis.

VII.

For the calendar year 1942, Alaska Junk Company reported gross sales in the amount of \$2,038,-384.76 on its partnership income tax information return filed on or about March 15, 1943. Included in said gross sales, were certain sales of merchandise made and delivered to a corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$243,975.86, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

VIII.

The net income, as reported on the information tax return of Alaska Junk Company for 1942, was in the amount of \$236,123.45 of which amount, the deceased, Jennie Wolf, reported on her individual income and victory tax return the sum of \$54,-030.86, said tax return being filed on or before March 15, 1943, and the said Jennie Wolf paid the said taxes due thereon to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

IX.

For the calendar year 1943, Alaska Junk Company reported gross sales in the amount of \$1,463,-

365.76 on its partnership income tax information return filed on or before March 15, 1944. Included in said gross sales, was merchandise sold and delivered to the said corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$103,-365.76, the amount of said item being carried on the books of said Alaska Junk Company as an account receivable.

X.

The net income as reported on the information tax return of the Partnership Alaska Junk Company for the calendar year 1943 in the amount of \$246,055.71 of which the deceased Jennie Wolf reported on her individual income and victory tax return, the sum of \$56,613.93, said tax return being filed on or before March 15, 1944, and said Jennie Wolf paid the taxes due thereon on or before said date to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

XI.

In computing the net income of Alaska Junk Company for the calendar year 1943, a loss was claimed on its income tax information return of \$202,350.60 for bad debts on account of the aforementioned merchandise sold and delivered to said Oregon Electric Steel Rolling Mills, the amount of which said items had theretofore been carried on the books of the Alaska Junk Company as accounts receivable.

XII.

On or about March 3, 1947, the Commissioner of

Internal Revenue determined that the aforementioned loss on account of merchandise sold and delivered to Oregon Electric Steel Rolling Mills constituted a capital contribution to said Corporation and was, therefore, not a proper bad debt deduction.

XIII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined a deficiency in income and victory tax for the calendar year 1943 against plaintiff herein, Blossom M. Grayson, as Transferee of the Estate of Jennie Wolf, by reason of the disallowance of the said bad debt deduction that had been taken on the information tax return of Alaska Junk Company.

XIV.

On June 2, 1947, the plaintiff, Blossom M. Grayson, as transferee of the Estate of Jennie Wolf, filed her petition with The Tax Court of the United States in Docket No. 14278 contending that the determination of the Commissioner of Internal Revenue, to the effect that said accounts receivable of the Oregon Electric Steel Rolling Mills were in fact capital contributions, was erroneous. Upon hearing the matter, the Tax Court of the United States determined the issues in favor of the Commissioner of Internal Revenue and promulgated its finding of fact and opinion on July 14, 1949.

The Court withheld entry of its decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit compu-

tations of the proper tax liability pursuant to the Court's opinion. The Commissioner filed his computation on October 6, 1949, showing a total liability of \$42,273.99 due and owing by the transferees of the Estate of Jennie Wolf, deceased. On November 7, 1949, the plaintiff, Blossom M. Grayson, as one of the transferees of the Estate of Jennie Wolf, filed her acquiescence in the computation submitted by the Commissioner. Thereafter, on November 9, 1949, the Court entered its final order and decision determining a deficiency on the part of the plaintiff, Blossom M. Grayson, as transferee of the Estate of Jennie Wolf, in income and victory tax for the calendar year 1943, for one-third of the amount of \$42,273.99, being the amount of the deficiency assessed against the three transferees of Jennie Wolf by reason of the said determination.

Thereafter, on January 4, 1950, the plaintiff, Blossom M. Grayson, as transferee of the Estate of Jennie Wolf, prosecuted an appeal from the decision of The Tax Court of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit rendered a per curiam opinion under date of July 24, 1950, affirming the decision of the Tax Court. On October 30, 1950, the plaintiff, Blossom M. Grayson, as transferee of the Estate of Jennie Wolf, petitioned the Supreme Court of the United States for a writ of certiorari to review the judgment of the Court of Appeals. The Supreme Court denied certiorari on January 2, 1951 (340 U.S. 911).

The parties stipulate that the findings of fact and the opinion of the Tax Court and the per curiam

opinion and judgment of the Court of Appeals for the Ninth Circuit are to be considered as part of the evidence and record before this Court; that said findings of fact and opinions are reported in the report of the Tax Court proceedings entitled *Sam Schnitzer, et al vs. Commissioner of Internal Revenue* at 13 T.C. 43, and in the report of the Court of Appeals proceeding of the same name at 183 F. 2d, 70; and that said reports are hereby incorporated and made a part of this stipulation.

XV.

On December 30, 1943, plaintiff Blossom M. Grayson, as transferee of the Estate of Jennie Wolf, paid the deficiency asserted as aforesaid and determined by the said judgment, to Hugh H. Earle, the then Collector of Internal Revenue for the District of Oregon, the amount so paid by plaintiff being \$14,091.33, being one-third of the total of the deficiency determined as against the three transferees of Jennie Wolf, deceased.

XVI.

By reason of the income and victory tax payments made on the original return of Jennie Wolf and the payments made on account of the deficiencies determined by the Commissioner of Internal Revenue and affirmed by The Tax Court of the United States as aforesaid, together with the interest on said deficiencies, the said taxpayer and her three transferees paid income and victory taxes, together with the interest on the deficiencies, in the amount of \$93,915.17 for the taxable year 1943.

XVII.

By virtue of the determination of the Commissioner of Internal Revenue, the decision of the Tax Court of the United States, the affirmance of that decision by the Court of Appeals for the Ninth Circuit and the denial of the petition for certiorari by the United States Supreme Court, as aforesaid, it has been adjudicated in effect that the merchandise sold and delivered by Alaska Junk Company to Oregon Electric Steel Rolling Mills were not sales but capital contributions.

As a result of said adjudication, it follows that the "sales" to Oregon Electric Steel Rolling Mills were erroneously carried on the books of the Alaska Junk Company as accounts receivable; they were erroneously included in the gross income of the partnership for 1942 and 1943; the income and victory taxes paid by the partners including Jennie Wolf on their distributive shares therefrom under the original returns, were erroneously paid; and the amounts of such "sales" should have been excluded from the gross income of Alaska Junk Company, thus reducing the amount of the net income reportable by said Alaska Junk Company, and thus reducing the amount of income reportable by the deceased, Jennie Wolf, on her individual income and victory tax return for the taxable year 1943.

XVIII.

On or about June 21, 1951, plaintiff Blossom M. Grayson, as transferee of the Estate of Jennie Wolf, filed with the Collector of Internal Revenue for the

District of Oregon, on Form 843, a claim for refund of one-third of tax and interest, to-wit, one-third of the sum of \$43,738.35, together with interest thereon as provided by law, a copy of which claim is attached to the complaint herein. It is stipulated that the copy of the claim attached to the complaint herein is a true and correct copy of the claim filed as aforesaid and may be marked and admitted as "Plaintiff's Pre-trial Exhibit No. 1".

XIX.

On or about August 1, 1951, the Commissioner of Internal Revenue notified the plaintiff, as transferee of the Estate of Jennie Wolf, by registered mail, that her said claim for refund had been disallowed.

XX.

That the said sum of \$43,738.35 has not been repaid to the decedent Jennie Wolf and/or her transferees and/or the plaintiff herein.

XXI.

In its returns for the years 1942 and 1943, the partnership, Alaska Junk Company, reported sales, costs of sales, gross profits, other incomes, total incomes, deductions and net incomes as follows:

	1942	1943
Sales.....	\$ 2,038,384.76	\$ 1,463,363.19
Cost of Sales.....	1,331,840.34	521,662.19
Gross profits.....	\$ 706,544.42	\$ 941,701.00
Other income.....	2,410.12	4,782.31
Total Income.....	\$ 708,954.54	\$ 946,483.31
Deductions.....	(a) 472,831.09	(a) 700,427.60
Net income.....	\$ 236,123.45	\$ 246,055.71

(a) Total deductions claimed for 1942 and 1943 included bad debts in the respective amounts of \$1,971.24 and \$206,008.92.

XXII.

In computing the amount of the refund claimed by the plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff eliminated the merchandise sold and delivered to Oregon Electric Steel Rolling Mills in the amount of \$243,975.86 and \$103,365.76 from the gross sales reported in the original returns of the partnership, as aforesaid, thus computing the refund on the basis of gross sales in the amount of \$1,794,408.90 and \$1,359,997.43 for the years 1942 and 1943, respectively.

XXIII.

In computing the amount of refund claimed by plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff used the same cost of sales reported in the original returns of the partnership, that is, \$1,331,840.34 and \$521,662.19 for the years 1942 and 1943, respectively. The plaintiff did not eliminate the cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, that is, plaintiff did not reduce the cost of sales as reported in the original returns of the partnership by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

XXIV.

The parties stipulate that the merchandise sold and delivered to Oregon Electric Steel Rolling Mills for the years 1942 and 1943, the amounts of which

have been excluded from gross income in computing the refund claimed by the plaintiff, had a cost of \$159,389.43 and \$36,849.89, respectively.

XXV.

The difference in the amount of income and victory tax of the deceased Jennie Wolf, as reported on her original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for the taxable year 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, is the sum of \$39,-075.29.

The difference in the amount of income and victory tax of the deceased, Jennie Wolf, as reported on her original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the cost of said merchandise, is the sum of \$24,487.71.

The parties stipulate that the above computations are true and correct and that in the event the Court shall determine that the prosecution of this action is not barred by Section 322(c) of the Internal Revenue Code of 1939, or by the principle of *res adjudicata*, and/or the doctrine of collateral estoppel, the judgment to be entered in favor of the

plaintiff and the other two transferees of the Estate of Jennie Wolf, deceased, shall be in accordance with and for the amount of overpayment shown in whichever of the above computations is determined by the Court to be applicable under the circumstances, to-wit:

One-third of \$39,075.29 or \$13,025.09 for each of said transferees; or

One-third of \$24,487.71 or \$8,162.57 for each of said transferees,

as the case may be; (plus interest as provided by law).

XXVI.

That in the computation submitted by the Commissioner of Internal Revenue on October 6, 1949, pursuant to Rule 50 of the Tax Court's Rules of Practice, as indicated in paragraph XIV above, the amount of sales which the Tax Court concluded were capital contributions were not eliminated from the gross sales as originally reported by the partnership, nor was the cost of such sales eliminated from the cost of goods sold as originally reported by said partnership. That the plaintiff, as transferee of Jennie Wolf, deceased, on November 7, 1949, filed her acquiescence in the computation submitted by the Commissioner of Internal Revenue, and that on November 9, 1949, the Tax Court entered its final order and decision in the matter. A true and correct copy of said computation, acquiescence and decision is attached hereto, and it is stipulated that the same may be admitted in evi-

dence and marked as "Defendant's Pre-Trial Exhibit 1".

XXVII.

The Tax Court proceedings entitled "Sam Schnitzer et al v. Commissioner of Internal Revenue", Docket Nos. 14208, 14209, 14278, 14279, 14280 and 14372, reported in 13 T.C. 43, are as shown and contained in the transcript of record No. 12471, which transcript accompanied the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It is stipulated by the parties that said transcript is a true and correct copy of the pleadings, findings of fact, opinion and decision of the Tax Court in said proceedings, and pertinent testimony and evidence adduced therein, together with the petition for review and per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit. It is further stipulated that said copy of the transcript of the Tax Court proceedings as aforesaid, may be marked and admitted in evidence as "Joint Pre-Trial Exhibit No. 1".

Plaintiff's Contentions

Plaintiff contends as follows:

I.

That since the partnership reported its income on the accrual basis and the sales made to Oregon Electric Steel Rolling Mills were regarded by the partnership as bona fide sales and carried on the books as accounts receivable, the partnership was, as a matter of law, compelled to report the said sales as a part of its gross income and to include

the same as gross income in reporting the distributive shares of the partners and in the net income of the partnership; that the partners were, as a matter of law, compelled to report in their individual income tax returns as income, the amount reported by the partnership as their distributive shares which included the income from the sales made to said Oregon Electric Steel Rolling Mills and the individual partners, including Jennie Wolf, did include in her individual income tax return for the year 1943, her distributive share of the income of the partnership as it was reported by the partnership in its information return, which included income from the sales to Oregon Electric Steel Rolling Mills as aforesaid, and Jennie Wolf paid the income taxes and victory taxes due thereon; that since the Commissioner of Internal Revenue disallowed the loss resulting from the failure of the Oregon Electric Steel Rolling Mills to pay said account receivable for the merchandise sold to it as aforesaid, and the Commissioner elected to treat the delivery of the merchandise by the partnership to said corporation as a contribution to capital of the corporation, and determined a deficiency by reason of the disallowance of said bad debt loss deduction, and the Court affirmed the determination of the Commissioner, the payment of taxes on the portion of the income determined to be capital contribution, was erroneous and resulted in an overpayment in that the delivery of said merchandise by the partnership to the said corporation could not be sales and capital contributions at the same

time, and since said delivery of merchandise would not constitute sales, it was improperly included in the net income and the taxes paid thereon were erroneously paid.

II.

This action to recover the taxes erroneously paid as aforesaid, is not barred by Section 322(c) of the Internal Revenue Code, but comes within the provision of Subdivision 2 of the exceptions to Section 322(c) of the Internal Revenue Code, in that the amount collected was in excess of the amount computed in accordance with the decision of the Board (Tax Court); that the claim for refund did not accrue until after the affirmance of the Commissioner's determination by the Courts and the payment of the deficiency determined thereby, and the Tax Court of the United States had no jurisdiction, referred to herein, to determine any refund, either in the original decision or in the judgment entered upon the computation under Rule 50.

III.

The judgment of the Tax Court of the United States is not *res adjudicata* in that the subject matter of the proceeding in the Tax Court of the United States was not the same as in this action and the proceedings in the two cases were between different parties. The Tax Court of the United States had no jurisdiction under the pleadings in that proceeding to determine the present claim for refund.

Defendant's Contentions

I.

This Action is Barred by Section 322(c) of the Internal Revenue Code of 1939.

The present suit involves the same tax for the same taxable year 1943 as was involved in the proceedings instituted by the plaintiff and related taxpayers before the Tax Court of the United States for redetermination of the deficiency in respect of their income tax for that taxable year.

Under the circumstances this action is barred by Section 322(c) of the Code. With certain exceptions not applicable here, the statute expressly provides that when a petition is filed with the Tax Court, which was the case here, no suit shall be instituted in any court for recovery of any part of "the tax for the taxable year" in respect of which the Commissioner of Internal Revenue has determined a deficiency.

The important thing with this statute is the filing of a petition in the Tax Court, rather than the decision of the Court. The taxpayer who elects to invoke the jurisdiction of the Tax Court must accept this consequence, and it is clear under the decided cases that the plaintiff has no right to sue the United States in this case.

II.

The Determination of the Tax Court Is Res Judicata

In the alternative, if this Court does not con-

sider that Section 322(c) of the 1939 Code effectively bars this action, then it is barred by an application of the principles of *res judicata*. The same tax liability, the same tax year, and the same parties or their privies are involved in the instant suit as in the prior adjudication.

Upon hearing the same matter in the prior proceedings, the Tax Court decided the issues raised by the pleadings in favor of the Commissioner of Internal Revenue and promulgated its findings of fact and its opinion on July 14, 1949 (13 T.C. 43). The Court withheld entry of its final order and decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion.

The Commissioner filed his computation on October 6, 1949, showing a total liability of \$42,273.99 due and owing by the transferees of the Estate of Jennie Wolf, deceased. The plaintiff, one of the transferees of said Estate, along with the other transferees, had ample opportunity under Rule 50 to present their objections to the Commissioner's computation of their tax liability in accordance with the Court's opinion.

Instead of objecting to the Commissioner's computation, plaintiff and the other transferees of the Estate of Jennie Wolf, deceased, acquiesced on November 7, 1949, in the computation submitted to the Court by the Commissioner, and the Court entered its order and decision accordingly on November 9, 1949. This final order and decision, determining a

deficiency of \$42,273.99 due and owing by said Estate, was affirmed on January 4, 1950, by the Court of Appeals for the Ninth Circuit (183 F.2d 70).

It is now too late, it is submitted, for the plaintiff and the other taxpayers to ask that any errors in the Rule 50 computation be corrected. The decision of the Tax Court which was affirmed by the Court of Appeals for this Circuit is a final decision which set at rest forever all questions litigated or which might have been litigated.

The plaintiff, it is submitted, has already clearly had his day in Court, and should not be permitted to relitigate the same issues in this Court, as a plain matter of justice and equity.

III.

Plaintiff's Recovery is Properly Denied on Grounds of Estoppel.

In the alternative, if this Court does not consider that Section 322(c) and/or the principle of res judicata effectively barred this action, then it is contended that the plaintiff is estopped by the decision of the Tax Court and by her acquiescence in the computation of the tax deficiency so ordered and decided by the Tax Court, as aforesaid, from any recovery herein.

Issues of Fact

There are no issues of fact for determination.

Issues of Law

I.

Whether this action is barred by Section 322(c) of the Internal Revenue Code of 1939, because of the prior proceedings instituted before the Tax Court of the United States under the provisions of Section 272(a) of said Code?

II.

Whether, in the alternative, the decision of the Tax Court of the United States, affirmed by the Court of Appeals for the Ninth Circuit, is *res judicata* upon a suit for the recovery of any part of the tax paid in satisfaction of the deficiency in tax so determined in the Tax Court proceedings?

III.

Which of the computations set forth in paragraph XXV of this Pre-Trial Order is applicable under the circumstances in the event the Court shall determine that this action is not barred under Section 322(c) of the Internal Revenue Code of 1939 or by the principle of *res judicata*, that is, whether the amount of overpayment is \$39,075.29, as contended by the plaintiff and the other transferees of the Estate of Jennie Wolf, deceased, or \$24,487.71 as contended by the defendant?

Plaintiff's Exhibits

Plaintiff's Exhibit No. 1: Claim for Refund.

Defendant's Exhibits

Defendant's Exhibit No. 1: Computation, Acquiescence and Decision.

Joint Exhibits

Joint Exhibit No. 1: Transcript of the Record in Tax Court proceedings titled: "Sam Schnitzer et al v. Commissioner of Internal Revenue, Docket Nos. 14208, 14209, 14278, 14279, 14280, 14372.

Certain exhibits have been identified and received as pre-trial exhibits, the parties agreeing, with the approval of the Court, that no further identification of said exhibits is necessary and it is stipulated that said exhibits shall be received in evidence as a part of the stipulated facts.

The Parties hereto waive trial by jury and agree to the foregoing Pre-Trial Order and stipulate that this action shall be submitted to the Court for determination upon this Pre-Trial Order and the stipulated facts set forth therein.

The Court being fully advised in the premises; now

Orders, that the foregoing Pre-Trial Order shall not be amended except by consent of both Parties or to prevent manifest injustice; and it is further

Ordered, that this Pre-Trial Order supersedes all pleadings.

Dated at Portland, Oregon, this 28th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge

Approved:

/s/ S. J. Bischoff

/s/ R. S. Jacob

Attorneys for Plaintiff

/s/ C. E. Luckey

Attorney for Defendant

/s/ John D. Picco

Of Counsel for Defendant

[Endorsed]: Filed Feb. 28, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial, plaintiff appeared herein by S. J. Bischoff, his Attorney, the defendant appeared herein by C. E. Luckey, United States Attorney for the District of Oregon, and by John D. Picco, its attorneys; whereupon the cause was submitted to the Court upon a stipulation of facts contained in the Pre-trial Order entered herein on the 28th day of February, 1955, and upon the exhibits described therein, briefs of the respective parties were submitted and argument made to the Court, the Court now makes and files herein the following:

Findings of Fact

The Court does hereby adopt, and makes as its findings of fact, all of the facts contained in the

stipulation of the parties incorporated in the aforesaid Pre-trial Order as if herein fully and at length set forth.

Upon the aforesaid findings of fact, the Court does hereby make and file herein the following:

Conclusions of Law

I.

That the claim for refund filed by the plaintiff and described in the findings of fact is not barred by the provisions of Section 322(c) of the Internal Revenue Code and the Court has jurisdiction of this suit upon said claim by virtue of the exception No. 2 to Section 322(c) of the Internal Revenue Code.

II.

The plaintiff's cause of action is not barred by the principles of res judicata or collateral estoppel.

III.

In computing the amount of refund to which plaintiff is entitled, there should be eliminated the cost of merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the costs of sales reported in the original return should be reduced by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

IV.

Plaintiff is entitled to a judgment against the defendant for the sum of \$13,025.09 with interest

thereon at the rate of 6% per annum from December 30, 1949, to the date of payment as required by law, together with her costs and disbursements incurred herein.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1955.

In the District Court of the United States for the
District of Oregon

Civil No. 7099

BLOSSOM M. GRAYSON, Transferee of the Estate of Jennie Wolf, Deceased, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Upon the findings of fact and conclusions of law duly made and filed herein, it is

Ordered and Adjudged that the plaintiff, Blossom M. Grayson, Transferee of the Estate of Jennie Wolf, deceased, do have judgment for and recover of and from The United States of America, the defendant herein, the sum of \$13,025.09 with interest thereon at the rate of 6% per annum from December 30, 1949, to date of payment as required by law,

and that plaintiff have judgment for her costs and disbursements incurred herein in the sum of \$. as taxed by the Clerk of this Court.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Blossom M. Grayson, Transferee of the Estate of Jennie Wolf, Deceased, Plaintiff, and to Jacob, Jones & Brown and S. J. Bischoff, her Attorneys:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on August 19, 1955 in favor of plaintiff and against defendant.

Dated: October 14, 1955.

C. E. LUCKEY,
U. S. Attorney, District of Oregon
/s/ VICTOR E. HARR,
Asst. U. S. Attorney,
Of Attorneys for Defendant

[Endorsed]: Filed October 14, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Defendant's motion to dismiss complaint; Order consolidating cases for hearing; Record of hearing on motion to dismiss complaint; Answer; Stipulation for entry of order consolidating actions for trial; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Motion for order extending time to docket appeal; Order extending time to docket appeal; Designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7099, in which The United States of America is the defendant and the appellant and Blossom M. Grayson, Transferee of the estate of Jennie Wolf, deceased, is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland, in said District, this 25th day of January, 1956.

[Seal]

R. DE MOTT,

Clerk.

/s/ By THORA LUND,

Deputy.

[Endorsed]: No. 15013. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Blossom M. Grayson, Transferee of the Estate of Jennie Wolf, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: January 26, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15011

United States of America, Appellant, vs. Monte L.
Wolf, Executor of the Estate of Harry J. Wolf,
Deceased, Appellee.

No. 15012

United States of America, Appellant, vs. Monte L.
Wolf, Transferee of the Estate of Jennie Wolf,
Deceased, Appellee.

No. 15013

United States of America, Appellant, vs. Blossom
M. Grayson, Transferee of the Estate of Jennie
Wolf, Deceased, Appellee.

No. 15014

United States of America, Appellant, vs. Charlotte
C. Cohon, Transferee of the Estate of Jennie
Wolf, Deceased, Appellee.

No. 15015

United States of America, Appellant, vs. Manuel
Schnitzer, Harold Schnitzer, Leonard Schnitzer,
Executors of the Estate of Sam Schnitzer, De-
ceased, Appellees.

MOTION TO CONSOLIDATE CASES FOR
BRIEFS AND HEARING

Comes now the appellant, United States of Amer-
ica, by and through C. E. Luckey, United States
Attorney for the District of Oregon, and Victor E.
Harr, Assistant United States Attorney, and moves
the Court for an order of consolidation of the above-
entitled cases for hearing and determination in the
above-entitled Court, and further that a consolida-

ated brief be permitted to be filed herein in respect to all of the above-entitled causes.

In support of this motion appellant represents that the said causes were consolidated for trial and determination in the court below and that the record submitted was considered by the Court as applicable to a determination of each of the said causes; that the said actions all grew out of a consolidated proceeding before the Tax Court of the United States in the case of Sam Schnitzer et al. vs. Commissioner, 13 T.C. 43, and the decision of that Court in that proceeding.

Dated at Portland, Oregon this 1st day of February, 1956.

C. E. LUCKEY,

U. S. Attorney for the District of
Oregon

/s/ VICTOR E. HARR,

Asst. U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN,

United States Circuit Court Judge

/s/ WM. HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for
the Ninth Circuit

Certificate of Service by Mail attached.

[Endorsed]: Filed Feb. 6, 1956. Paul P. O'Brien,
Clerk.

No. 15014

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

CHARLOTTE C. COHON, Transferee of the Es-
tate of Jennie Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

MAY 24 1956

PAUL P. O'BRIEN, CLERK

No. 15014

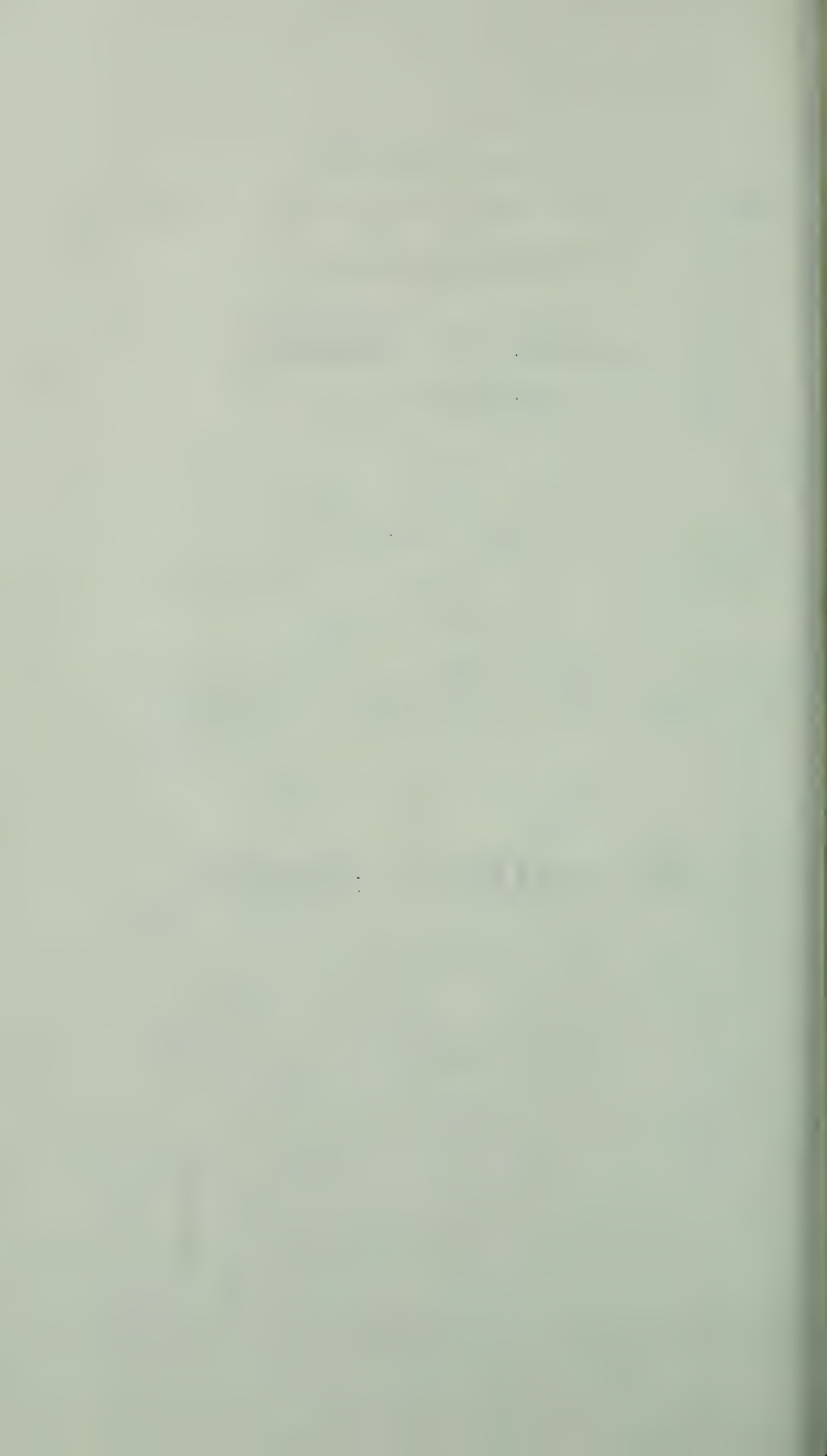
United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

CHARLOTTE C. COHON, Transferee of the Es-
tate of Jennie Wolf, deceased, Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,

Asst. U. S. Attorney General,

Dept. of Justice, Washington, D. C.,

C. E. LUCKEY,

United States Attorney,

VICTOR E. HARR,

Asst. U. S. Attorney,

United States Courthouse,

Portland, Oregon,

For Appellant.

JACOB, JONES & BROWN,

Public Service Building,

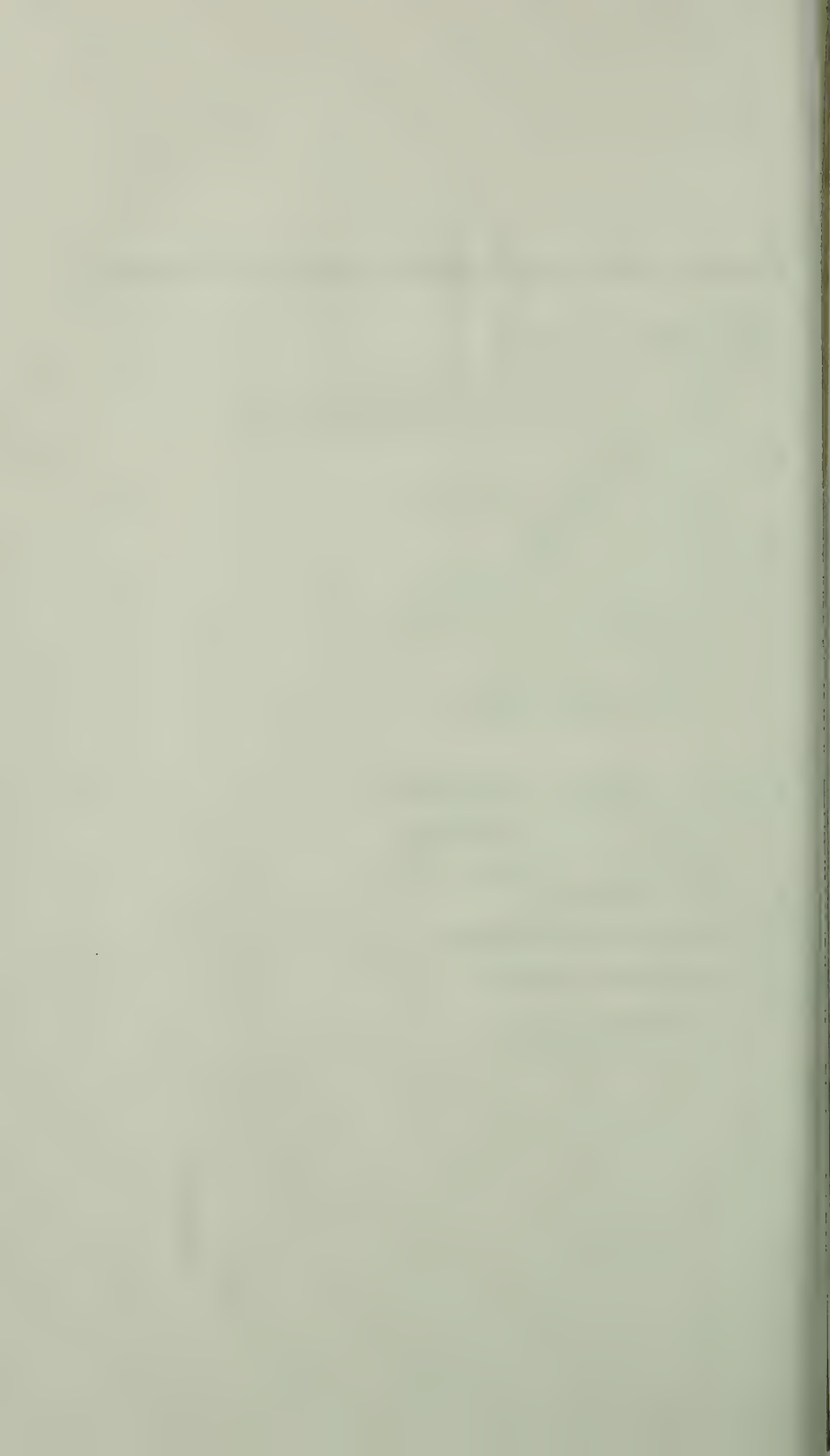
Portland 4, Oregon, and

S. J. BISCHOFF,

902 Cascade Building,

Portland, Oregon,

For Appellee.



In the District Court of the United States for the
District of Oregon

Civil No. 7100

CHARLOTTE C. COHON, Transferee of the Es-
tate of Jennie Wolf, deceased, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

PRE-TRIAL ORDER

At this time the above entitled cause came on for pre-trial before the undersigned Judge of the above entitled Court. Plaintiff appeared herein by S. J. Bischoff, her Attorney. Defendant appeared herein by and through C. E. Luckey and as its Attorney.

The following are the agreed facts:

I.

During the calendar years 1942 and 1943, and until her death on April 8, 1945, Jennie Wolf was a resident of the County of Multnomah, State of Oregon, and was then and until her death, a citizen of The United States of America.

II.

Jennie Wolf was a partner in the partnership of Alaska Junk Company during said years, having a one-fourth interest in said partnership, which partnership interest continued until the date of her

death; that plaintiff is the transferee of the estate of Jennie Wolf, deceased, by virtue of the provisions of the will of Jennie Wolf wherein her interest in the said partnership vested in her three children, the plaintiff herein, and Monte L. Wolf and Blossom M. Grayson, each of them acquiring a one-third in said partnership interest of said Jennie Wolf, deceased.

III.

At all the times from September 1, 1947, to and including October 31, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Revenue for the District of Oregon and the said Hugh H. Earle is no longer in office and was not in office at the time of the commencement of this action.

IV.

At all the times from July 17, 1933, to and including August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon and the said James W. Maloney is no longer in office and was not in office at the time of the commencement of this action.

V.

During all the times mentioned herein, the decedent Jennie Wolf kept her personal books and made and filed her income and victory tax returns on the cash receipts and disbursements and calendar year basis.

VI.

During the taxable years 1942 and 1943, while said Jennie Wolf was a member of said partnership of Alaska Junk Company, the said partnership kept its books of account and filed its partnership income tax information returns on a calendar year and accrual basis.

VII.

For the calendar year 1942, Alaska Junk Company reported gross sales in the amount of \$2,038,-384.76 on its partnership income tax information return filed on or about March 15, 1943. Included in said gross sales, were certain sales of merchandise made and delivered to a corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$243,975.86, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

VIII.

The net income, as reported on the information tax return of Alaska Junk Company for 1942, was in the amount of \$236,123.45 of which amount, the deceased, Jennie Wolf, reported on her individual income and victory tax return the sum of \$54,-030.86, said tax return being filed on or before March 15, 1943, and the said Jennie Wolf paid the said taxes due thereon to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

IX.

For the calendar year 1943, Alaska Junk Company reported gross sales in the amount of \$1,463,-

365.76 on its partnership income tax information return filed on or before March 15, 1944. Included in said gross sales, was merchandise sold and delivered to the said corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$103,-365.76, the amount of said item being carried on the books of said Alaska Junk Company as an account receivable.

X.

The net income as reported on the information tax return of the Partnership Alaska Junk Company for the calendar year 1943 in the amount of \$246,055.71 of which the deceased Jennie Wolf reported on her individual income and victory tax return, the sum of \$56,613.93, said tax return being filed on or before March 15, 1944, and said Jennie Wolf paid the taxes due thereon on or before said date to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

XI.

In computing the net income of Alaska Junk Company for the calendar year 1943, a loss was claimed on its income tax information return of \$202,350.60 for bad debts on account of the aforementioned merchandise sold and delivered to said Oregon Electric Steel Rolling Mills, the amount of which said items had theretofore been carried on the books of the Alaska Junk Company as accounts receivable.

XII.

On or about March 3, 1947, the Commissioner of

Internal Revenue determined that the aforementioned loss on account of merchandise sold and delivered to Oregon Electric Steel Rolling Mills constituted a capital contribution to said Corporation and was, therefore, not a proper bad debt deduction.

XIII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined a deficiency in income and victory tax for the calendar year 1943 against plaintiff herein, Charlotte C. Cohon, as Transferee of the Estate of Jennie Wolf, by reason of the disallowance of the said bad debt deduction that had been taken on the information tax return of Alaska Junk Company.

XIV.

On June 2, 1947, the plaintiff, Charlotte C. Cohon, as transferee of the Estate of Jennie Wolf, filed her petition with The Tax Court of the United States in Docket No. 14278 contending that the determination of the Commissioner of Internal Revenue, to the effect that said accounts receivable of the Oregon Electric Steel Rolling Mills were in fact capital contributions, was erroneous. Upon hearing the matter, the Tax Court of the United States determined the issues in favor of the Commissioner of Internal Revenue and promulgated its finding of fact and opinion on July 14, 1949.

The Court withheld entry of its decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit compu-

tations of the proper tax liability pursuant to the Court's opinion. The Commissioner filed his computation on October 6, 1949, showing a total liability of \$42,273.99 due and owing by the transferees of the Estate of Jennie Wolf, deceased. On November 7, 1949, the plaintiff, Charlotte C. Cohon, as one of the transferees of the Estate of Jennie Wolf, filed her acquiescence in the computation submitted by the Commissioner. Thereafter, on November 9, 1949, the Court entered its final order and decision determining a deficiency on the part of the plaintiff, Charlotte C. Cohon, as transferee of the Estate of Jennie Wolf, in income and victory tax for the calendar year 1943, for one-third of the amount of \$42,273.99, being the amount of the deficiency assessed against the three transferees of Jennie Wolf by reason of the said determination.

Thereafter, on January 4, 1950, the plaintiff, Charlotte C. Cohon, as transferee of the Estate of Jennie Wolf, prosecuted an appeal from the decision of The Tax Court of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit rendered a per curiam opinion under date of July 24, 1950, affirming the decision of the Tax Court. On October 30, 1950, the plaintiff, Charlotte C. Cohon, as transferee of the Estate of Jennie Wolf, petitioned the Supreme Court of the United States for a writ of certiorari to review the judgment of the Court of Appeals. The Supreme Court denied certiorari on January 2, 1951 (340 U.S. 911).

The parties stipulate that the findings of fact and the opinion of the Tax Court and the per curiam

opinion and judgment of the Court of Appeals for the Ninth Circuit are to be considered as part of the evidence and record before this Court; that said findings of fact and opinions are reported in the report of the Tax Court proceedings entitled *Sam Schmitzer, et al vs. Commissioner of Internal Revenue* at 13 T.C. 43, and in the report of the Court of Appeals proceeding of the same name at 183 F. 2d, 70; and that said reports are hereby incorporated and made a part of this stipulation.

XV.

On December 30, 1949, plaintiff Charlotte C. Cohon, as transferee of the Estate of Jennie Wolf, paid the deficiency asserted as aforesaid and determined by the said judgment, to Hugh H. Earle, the then Collector of Internal Revenue for the District of Oregon, the amount so paid by plaintiff being \$14,091.33, being one-third of the total of the deficiency determined as against the three transferees of Jennie Wolf, deceased.

XVI.

By reason of the income and victory tax payments made on the original return of Jennie Wolf and the payments made on account of the deficiencies determined by the Commissioner of Internal Revenue and affirmed by The Tax Court of the United States as aforesaid, together with the interest on said deficiencies, the said taxpayer and her three transferees paid income and victory taxes, together with the interest on the deficiencies, in the amount of \$93,915.17 for the taxable year 1943.

XVII.

By virtue of the determination of the Commissioner of Internal Revenue, the decision of the Tax Court of the United States, the affirmance of that decision by the Court of Appeals for the Ninth Circuit and the denial of the petition for certiorari by the United States Supreme Court, as aforesaid, it has been adjudicated in effect that the merchandise sold and delivered by Alaska Junk Company to Oregon Electric Steel Rolling Mills were not sales but capital contributions.

As a result of said adjudication, it follows that the "sales" to Oregon Electric Steel Rolling Mills were erroneously carried on the books of the Alaska Junk Company as accounts receivable; they were erroneously included in the gross income of the partnership for 1942 and 1943; the income and victory taxes paid by the partners including Jennie Wolf on their distributive shares therefrom under the original returns, were erroneously paid; and the amounts of such "sales" should have been excluded from the gross income of Alaska Junk Company, thus reducing the amount of the net income reportable by said Alaska Junk Company, and thus reducing the amount of income reportable by the deceased, Jennie Wolf, on her individual income and victory tax return for the taxable year 1943.

XVIII.

On or about June 21, 1951, plaintiff Charlotte C. Cohon, as transferee of the Estate of Jennie Wolf, filed with the Collector of Internal Revenue for the

District of Oregon, on Form 843, a claim for refund of one-third of tax and interest, to-wit, one-third of the sum of \$43,738.35, together with interest thereon as provided by law, a copy of which claim is attached to the complaint herein. It is stipulated that the copy of the claim attached to the complaint herein is a true and correct copy of the claim filed as aforesaid and may be marked and admitted as "Plaintiff's Pre-trial Exhibit No. 1".

XIX.

On or about August 1, 1951, the Commissioner of Internal Revenue notified the plaintiff, as transferee of the Estate of Jennie Wolf, by registered mail, that her said claim for refund had been disallowed.

XX.

That the said sum of \$43,738.35 has not been repaid to the decedent Jennie Wolf and/or her transferees and/or the plaintiff herein.

XXI.

In its returns for the years 1942 and 1943, the partnership, Alaska Junk Company, reported sales, costs of sales, gross profits, other incomes, total incomes, deductions and net incomes as follows:

	1942	1943
Sales.....	\$ 2,038,384.76	\$ 1,463,363.19
Cost of Sales.....	1,331,840.34	521,662.19
Gross profits.....	\$ 706,544.42	\$ 941,701.00
Other income.....	2,410.12	4,782.31
Total Income.....	\$ 708,954.54	\$ 946,483.31
Deductions.....	(a) 472,831.09	(a) 700,427.60
Net income.....	\$ 236,123.45	\$ 246,055.71

(a) Total deductions claimed for 1942 and 1943 included bad debts in the respective amounts of \$1,971.24 and \$206,008.92.

XXII.

In computing the amount of the refund claimed by the plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff eliminated the merchandise sold and delivered to Oregon Electric Steel Rolling Mills in the amount of \$243,-975.86 and \$103,365.76 from the gross sales reported in the original returns of the partnership, as aforesaid, thus computing the refund on the basis of gross sales in the amount of \$1,794,408.90 and \$1,359,997.43 for the years 1942 and 1943, respectively.

XXIII.

In computing the amount of refund claimed by plaintiff, as set forth in the claim referred to in paragraph XVIII, the plaintiff used the same cost of sales reported in the original returns of the partnership, that is, \$1,331,840.34 and \$521,662.19 for the years 1942 and 1943, respectively. The plaintiff did not eliminate the cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, that is, plaintiff did not reduce the cost of sales as reported in the original returns of the partnership by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

XXIV.

The parties stipulate that the merchandise sold and delivered to Oregon Electric Steel Rolling Mills for the years 1942 and 1943 the amounts of which

have been excluded from gross income in computing the refund claimed by the plaintiff, had a cost of \$159,389.43 and \$36,849.89, respectively.

XXV.

The difference in the amount of income and victory tax of the deceased Jennie Wolf, as reported on her original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for the taxable year 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, is the sum of \$39,-075.29.

The difference in the amount of income and victory tax of the deceased, Jennie Wolf, as reported on her original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the cost of said merchandise, is the sum of \$24,487.71.

The parties stipulate that the above computations are true and correct and that in the event the Court shall determine that the prosecution of this action is not barred by Section 322(c) of the Internal Revenue Code of 1939, or by the principle of *res adjudicata*, and/or the doctrine of collateral estoppel, the judgment to be entered in favor of the

plaintiff and the other two transferees of the Estate of Jennie Wolf, deceased, shall be in accordance with and for the amount of overpayment shown in whichever of the above computations is determined by the Court to be applicable under the circumstances, to-wit:

One-third of \$39,075.29 or \$13,025.09 for each of said transferees; or

One-third of \$24,487.71 or \$8,162.57 for each of said transferees,

as the case may be; (plus interest as provided by law).

XXVI.

That in the computation submitted by the Commissioner of Internal Revenue on October 6, 1949, pursuant to Rule 50 of the Tax Court's Rules of Practice, as indicated in paragraph XIV above, the amount of sales which the Tax Court concluded were capital contributions were not eliminated from the gross sales as originally reported by the partnership, nor was the cost of such sales eliminated from the cost of goods sold as originally reported by said partnership. That the plaintiff, as transferee of Jennie Wolf, deceased, on November 7, 1949, filed her acquiescence in the computation submitted by the Commissioner of Internal Revenue, and that on November 9, 1949, the Tax Court entered its final order and decision in the matter. A true and correct copy of said computation, acquiescence and decision is attached hereto, and it is stipulated that the same may be admitted in evi-

dence and marked as "Defendant's Pre-Trial Exhibit 1".

XXVII.

The Tax Court proceedings entitled "Sam Schnitzer et al v. Commissioner of Internal Revenue", Docket Nos. 14208, 14209, 14278, 14279, 14280 and 14372, reported in 13 T.C. 43, are as shown and contained in the transcript of record No. 12471, which transcript accompanied the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It is stipulated by the parties that said transcript is a true and correct copy of the pleadings, findings of fact, opinion and decision of the Tax Court in said proceedings, and pertinent testimony and evidence adduced therein, together with the petition for review and per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit. It is further stipulated that said copy of the transcript of the Tax Court proceedings as aforesaid, may be marked and admitted in evidence as "Joint Pre-Trial Exhibit No. 1".

Plaintiff's Contentions

Plaintiff contends as follows:

I.

That since the partnership reported its income on the accrual basis and the sales made to Oregon Electric Steel Rolling Mills were regarded by the partnership as bona fide sales and carried on the books as accounts receivable, the partnership was, as a matter of law, compelled to report the said sales as a part of its gross income and to include

the same as gross income in reporting the distributive shares of the partners and in the net income of the partnership; that the partners were, as a matter of law, compelled to report in their individual income tax returns as income, the amount reported by the partnership as their distributive shares which included the income from the sales made to said Oregon Electric Steel Rolling Mills and the individual partners, including Jennie Wolf, did include in her individual income tax return for the year 1943, her distributive share of the income of the partnership as it was reported by the partnership in its information return, which included income from the sales to Oregon Electric Steel Rolling Mills as aforesaid, and Jennie Wolf paid the income taxes and victory taxes due thereon; that since the Commissioner of Internal Revenue disallowed the loss resulting from the failure of the Oregon Electric Steel Rolling Mills to pay said account receivable for the merchandise sold to it as aforesaid, and the Commissioner elected to treat the delivery of the merchandise by the partnership to said corporation as a contribution to capital of the corporation, and determined a deficiency by reason of the disallowance of said bad debt loss deduction, and the Court affirmed the determination of the Commissioner, the payment of taxes on the portion of the income determined to be capital contribution, was erroneous and resulted in an overpayment in that the delivery of said merchandise by the partnership to the said corporation could not be sales and capital contributions at the same

time, and since said delivery of merchandise would not constitute sales, it was improperly included in the net income and the taxes paid thereon were erroneously paid.

II.

This action to recover the taxes erroneously paid as aforesaid, is not barred by Section 322(c) of the Internal Revenue Code, but comes within the provision of Subdivision 2 of the exceptions to Section 322(c) of the Internal Revenue Code, in that the amount collected was in excess of the amount computed in accordance with the decision of the Board (Tax Court); that the claim for refund did not accrue until after the affirmance of the Commissioner's determination by the Courts and the payment of the deficiency determined thereby, and the Tax Court of the United States had no jurisdiction, referred to herein, to determine any refund, either in the original decision or in the judgment entered upon the computation under Rule 50.

III.

The judgment of the Tax Court of the United States is not *res adjudicata* in that the subject matter of the proceeding in the Tax Court of the United States was not the same as in this action and the proceedings in the two cases were between different parties. The Tax Court of the United States had no jurisdiction under the pleadings in that proceeding to determine the present claim for refund.

Defendant's Contentions

I.

This Action is Barred by Section 322(c) of the Internal Revenue Code of 1939.

The present suit involves the same tax for the same taxable year 1943 as was involved in the proceedings instituted by the plaintiff and related taxpayers before the Tax Court of the United States for redetermination of the deficiency in respect of their income tax for that taxable year.

Under the circumstances this action is barred by Section 322(c) of the Code. With certain exceptions not applicable here, the statute expressly provides that when a petition is filed with the Tax Court, which was the case here, no suit shall be instituted in any court for recovery of any part of "the tax for the taxable year" in respect of which the Commissioner of Internal Revenue has determined a deficiency.

The important thing with this statute is the filing of a petition in the Tax Court, rather than the decision of the Court. The taxpayer who elects to invoke the jurisdiction of the Tax Court must accept this consequence, and it is clear under the decided cases that the plaintiff has no right to sue the United States in this case.

II.

The Determination of the Tax Court Is Res Judicata

In the alternative, if this Court does not con-

sider that Section 322(c) of the 1939 Code effectively bars this action, then it is barred by an application of the principles of *res judicata*. The same tax liability, the same tax year, and the same parties or their privies are involved in the instant suit as in the prior adjudication.

Upon hearing the same matter in the prior proceedings, the Tax Court decided the issues raised by the pleadings in favor of the Commissioner of Internal Revenue and promulgated its findings of fact and its opinion on July 14, 1949 (13 T.C. 43). The Court withheld entry of its final order and decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion.

The Commissioner filed his computation on October 6, 1949, showing a total liability of \$42,273.99 due and owing by the transferees of the Estate of Jennie Wolf, deceased. The plaintiff, one of the transferees of said Estate, along with the other transferees, had ample opportunity under Rule 50 to present their objections to the Commissioner's computation of their tax liability in accordance with the Court's opinion.

Instead of objecting to the Commissioner's computation, plaintiff and the other transferees of the Estate of Jennie Wolf, deceased, acquiesced on November 7, 1949, in the computation submitted to the Court by the Commissioner, and the Court entered its order and decision accordingly on November 9, 1949. This final order and decision, determining a

deficiency of \$42,273.99 due and owing by said Estate, was affirmed on January 4, 1950, by the Court of Appeals for the Ninth Circuit (183 F.2d 70).

It is now too late, it is submitted, for the plaintiff and the other taxpayers to ask that any errors in the Rule 50 computation be corrected. The decision of the Tax Court which was affirmed by the Court of Appeals for this Circuit is a final decision which set at rest forever all questions litigated or which might have been litigated.

The plaintiff, it is submitted, has already clearly had his day in Court, and should not be permitted to relitigate the same issues in this Court, as a plain matter of justice and equity.

III.

Plaintiff's Recovery is Properly Denied on Grounds of Estoppel.

In the alternative, if this Court does not consider that Section 322(c) and/or the principle of res judicata effectively barred this action, then it is contended that the plaintiff is estopped by the decision of the Tax Court and by her acquiescence in the computation of the tax deficiency so ordered and decided by the Tax Court, as aforesaid, from any recovery herein.

Issues of Fact

There are no issues of fact for determination.

Issues of Law

I.

Whether this action is barred by Section 322(c) of the Internal Revenue Code of 1939, because of the prior proceedings instituted before the Tax Court of the United States under the provisions of Section 272(a) of said Code?

II.

Whether, in the alternative, the decision of the Tax Court of the United States, affirmed by the Court of Appeals for the Ninth Circuit, is *res judicata* upon a suit for the recovery of any part of the tax paid in satisfaction of the deficiency in tax so determined in the Tax Court proceedings?

III.

Which of the computations set forth in paragraph XXV of this Pre-Trial Order is applicable under the circumstances in the event the Court shall determine that this action is not barred under Section 322(c) of the Internal Revenue Code of 1939 or by the principle of *res judicata*, that is, whether the amount of overpayment is \$39,075.29, as contended by the plaintiff and the other transferees of the Estate of Jennie Wolf, deceased, or \$24,487.71 as contended by the defendant?

Plaintiff's Exhibits

Plaintiff's Exhibit No. 1: Claim for Refund.

Defendant's Exhibits

Defendant's Exhibit No. 1: Computation, Acquiescence and Decision.

Joint Exhibits

Joint Exhibit No. 1: Transcript of the Record in Tax Court proceedings titled: "Sam Schnitzer et al v. Commissioner of Internal Revenue, Docket Nos. 14208, 14209, 14278, 14279, 14280, 14372.

Certain exhibits have been identified and received as pre-trial exhibits, the parties agreeing, with the approval of the Court, that no further identification of said exhibits is necessary and it is stipulated that said exhibits shall be received in evidence as a part of the stipulated facts.

The Parties hereto waive trial by jury and agree to the foregoing Pre-Trial Order and stipulate that this action shall be submitted to the Court for determination upon this Pre-Trial Order and the stipulated facts set forth therein.

The Court being fully advised in the premises; now

Orders, that the foregoing Pre-Trial Order shall not be amended except by consent of both Parties or to prevent manifest injustice; and it is further

Ordered, that this Pre-Trial Order supersedes all pleadings.

Dated at Portland, Oregon, this 28th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge

Approved:

/s/ S. J. Bischoff

/s/ R. S. Jacob

Attorneys for Plaintiff

/s/ C. E. Luckey

Attorney for Defendant

/s/ John D. Picco

Of Counsel for Defendant

[Endorsed]: Filed Feb. 28, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial, plaintiff appeared herein by S. J. Bischoff, his Attorney, the defendant appeared herein by C. E. Luckey, United States Attorney for the District of Oregon, and by John D. Picco, its attorneys; whereupon the cause was submitted to the Court upon a stipulation of facts contained in the Pre-trial Order entered herein on the 28th day of February, 1955, and upon the exhibits described therein, briefs of the respective parties were submitted and argument made to the Court, the Court now makes and files herein the following:

Findings of Fact

The Court does hereby adopt, and makes as its findings of fact, all of the facts contained in the

stipulation of the parties incorporated in the aforesaid Pre-trial Order as if herein fully and at length set forth.

Upon the aforesaid findings of fact, the Court does hereby make and file herein the following:

Conclusions of Law

I.

That the claim for refund filed by the plaintiff and described in the findings of fact is not barred by the provisions of Section 322(c) of the Internal Revenue Code and the Court has jurisdiction of this suit upon said claim by virtue of the exception No. 2 to Section 322(c) of the Internal Revenue Code.

II.

The plaintiff's cause of action is not barred by the principles of res judicata or collateral estoppel.

III.

In computing the amount of refund to which plaintiff is entitled, there should be eliminated the cost of merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the costs of sales reported in the original return should be reduced by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

IV.

Plaintiff is entitled to a judgment against the defendant for the sum of \$13,025.09 with interest

thereon at the rate of 6% per annum from December 30, 1949, to the date of payment as required by law, together with her costs and disbursements incurred herein.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1955.

In the District Court of the United States for the
District of Oregon

Civil No. 7100

CHARLOTTE C. COHON, Transferee of the Es-
tate of Jennie Wolf, Deceased, Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Upon the findings of fact and conclusions of law duly made and filed herein, it is

Ordered and Adjudged that the plaintiff, Charlotte C. Cohon, Transferee of the Estate of Jennie Wolf, deceased, do have judgment for and recover of and from The United States of America, the defendant herein, the sum of \$13,025.09 with interest thereon at the rate of 6% per annum from December 30, 1949, to date of payment as required by law,

and that plaintiff have judgment for her costs and disbursements incurred herein in the sum of \$. as taxed by the Clerk of this Court.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed August 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Charlotte C. Cohon, Transferee of the Estate of Jennie Wolf, Deceased, Plaintiff, and to Jacob, Jones & Brown and S. J. Bischoff, her Attorneys:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on August 19, 1955 in favor of plaintiff and against defendant.

Dated: October 14, 1955.

C. E. LUCKEY,
U. S. Attorney, District of Oregon
/s/ VICTOR E. HARR,
Asst. U. S. Attorney,
Of Attorneys for Defendant

[Endorsed]: Filed October 14, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Complaint; Defendant's motion to dismiss complaint; Order consolidating cases for hearing; Record of hearing on motion to dismiss complaint; Answer; Stipulation for entry of order consolidating actions for trial; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Motion for order extending time to docket appeal; Order extending time to docket appeal; Designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7100, in which The United States of America is the defendant and the appellant and Charlotte C. Cohon, Transferee of the estate of Jennie Wolf, deceased, is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my

hand and affixed the seal of said court in Portland, in said District, this 25th day of January, 1956.

[Seal]

R. DE MOTT,

Clerk.

/s/ By THORA LUND,

Deputy.

[Endorsed]: No. 15014. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Charlotte C. Cohon, Transferee of the Estate of Jennie Wolf, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: January 26, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15011

United States of America, Appellant, vs. Monte L.
Wolf, Executor of the Estate of Harry J. Wolf,
Deceased, Appellee.

No. 15012

United States of America, Appellant, vs. Monte L.
Wolf, Transferee of the Estate of Jennie Wolf,
Deceased, Appellee.

No. 15013

United States of America, Appellant, vs. Blossom
M. Grayson, Transferee of the Estate of Jennie
Wolf, Deceased, Appellee.

No. 15014

United States of America, Appellant, vs. Charlotte
C. Cohon, Transferee of the Estate of Jennie
Wolf, Deceased, Appellee.

No. 15015

United States of America, Appellant, vs. Manuel
Schnitzer, Harold Schnitzer, Leonard Schnitzer,
Executors of the Estate of Sam Schnitzer, De-
ceased, Appellees.

MOTION TO CONSOLIDATE CASES FOR
BRIEFS AND HEARING

Comes now the appellant, United States of Amer-
ica, by and through C. E. Luckey, United States
Attorney for the District of Oregon, and Victor E.
Harr, Assistant United States Attorney, and moves
the Court for an order of consolidation of the above-
entitled cases for hearing and determination in the
above-entitled Court, and further that a consolid-

ated brief be permitted to be filed herein in respect to all of the above-entitled causes.

In support of this motion appellant represents that the said causes were consolidated for trial and determination in the court below and that the record submitted was considered by the Court as applicable to a determination of each of the said causes; that the said actions all grew out of a consolidated proceeding before the Tax Court of the United States in the case of Sam Schnitzer et al. vs. Commissioner, 13 T.C. 43, and the decision of that Court in that proceeding.

Dated at Portland, Oregon this 1st day of February, 1956.

C. E. LUCKEY,

U. S. Attorney for the District of
Oregon

/s/ VICTOR E. HARR,

Asst. U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN,

United States Circuit Court Judge

/s/ WM. HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for
the Ninth Circuit

Certificate of Service by Mail attached.

[Endorsed]: Filed Feb. 6, 1956. Paul P. O'Brien,
Clerk.

No. 15015

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

MANUEL SCHNITZER, HAROLD SCHNITZER and LEONARD SCHNITZER, Executors of the Estate of Sam Schnitzer, deceased,
Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Oregon

FILED

MAY 24 1956

PAUL P. O'BRIEN, CLERK

No. 15015

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

MANUEL SCHNITZER, HAROLD SCHNITZER and LEONARD SCHNITZER, Executors of the Estate of Sam Schnitzer, deceased,
Appellees.

Transcript of Record

Appeal from the United States District Court
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{Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.}

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NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,

Asst. U. S. Attorney General,
Dept. of Justice, Washington, D. C.,

C. E. LUCKEY,

United States Attorney,

VICTOR E. HARR,

Asst. U. S. Attorney,
United States Courthouse,
Portland, Oregon,

For Appellant.

JACOB, JONES & BROWN,

Public Service Building,
Portland 4, Oregon, and

S. J. BISCHOFF,

902 Cascade Building,
Portland, Oregon,

For Appellee.

In the District Court of the United States for the
District of Oregon

Civil No. 7102

MANUEL SCHNITZER, HAROLD SCHNITZER,
LEONARD SCHNITZER, Executors of
the Estate of Sam Schnitzer, deceased,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

PRE-TRIAL ORDER

At this time the above entitled cause came on for pre-trial before the undersigned Judge of the above entitled Court. Plaintiffs appeared herein by S. J. Bischoff, their Attorney. Defendant appeared herein by and through C. E. Luckey and as its Attorney.

The following are the

Agreed Facts

I.

During the calendar years 1942 and 1943, and until his death on March 16, 1952, Sam Schnitzer was a resident of the County of Multnomah, State of Oregon, and was then and until his death a citizen of the United States of America.

II.

Plaintiffs herein are the duly qualified and acting Executors of the Estate of Sam Schnitzer, deceased,

to whom letters testamentary were granted by the Circuit Court (Probate Department) for the County of Multnomah, State of Oregon, on March 25, 1952.

III.

At all times from September 1, 1947, to and including October 30, 1952, Hugh H. Earle was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said Hugh H. Earle is no longer in office.

IV.

At all times from July 17, 1933 to and including August 31, 1947, James W. Maloney was the duly commissioned, qualified and acting United States Collector of Internal Revenue for the District of Oregon, and the said James W. Maloney is no longer in office.

V.

During all times mentioned herein, the decedent, Sam Schnitzer, kept his personal books and made and filed his income and victory tax returns on the cash receipts and disbursements and calendar year basis.

VI.

That during all times during the taxable years 1942 and 1943 the decedent, Sam Schnitzer, was a member of a partnership known as Alaska Junk Company. Said partnership was comprised of the decedent, Sam Schnitzer, Rose Schnitzer, Harry J. Wolf and Jennie Wolf. Said partnership during all times mentioned herein filed its partnership income

tax information returns on a calendar year and accrual basis.

VII.

For the calendar year 1942 Alaska Junk Company reported gross sales in the amount of \$2,038,384.76 on its partnership income tax information return filed on or about March 15, 1943. Included in said gross sales were certain sales of merchandise made and delivered to a corporation known as "Oregon Electric Steel Rolling Mills" in the sum of \$243,975.86, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

VIII.

The net income as reported on the information tax return of Alaska Junk Company for 1942 was in the amount of \$236,123.45 of which amount the decedent Sam Schnitzer reported on his individual income and victory tax return the sum of \$64,030.86, said tax return being filed on or about March 15, 1943, and said Sam Schnitzezr paid said taxes to said James W. Maloney, the then Collector of Internal Revenue for the District of Oregon.

IX.

For the calendar year 1943, Alaska Junk Company reported gross sales in the amount of \$1,463,365.76 on its partnership income tax information return filed on or about March 15, 1944. Included in said purported gross sales were certain items of merchandise sold and delivered to a corporation known as "Oregon Electric Steel Rolling Mills" in the sum

of \$103,365.76, the amount of said items being carried on the books of said Alaska Junk Company as accounts receivable.

X.

The net income as reported on the information tax return of Alaska Junk Company for the calendar year 1943 was in the amount of \$246,055.71, of which the decedent, Sam Schnitzer, reported on his individual income and victory tax return the sum of \$66,513.92, said tax return being filed on or about March 15, 1944, and said Sam Schnitzer paid said taxes on or before said date, to said James W. Maloney, then Collector of Internal Revenue for the District of Oregon.

XI.

In computing the net income of Alaska Junk Company for the calendar year 1943, a loss was claimed on its income tax information return of \$202,350.60 for bad debts on account of the aforementioned merchandise sold and delivered to Oregon Electric Steel Rolling Mills, the amount of which said items had theretofore been carried on the books of Alaska Junk Company as accounts receivable.

XII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined that the aforementioned loss on account of merchandise sold and delivered to Oregon Electric Steel Rolling Mills constituted a capital contribution to said Corporation and was, therefore, not a proper bad debt deduction.

XIII.

On or about March 3, 1947, the Commissioner of Internal Revenue determined a deficiency in income and victory tax for the calendar year 1943 against plaintiff herein, Sam Schnitzer, by reason of the disallowance of the said bad debt deduction that had been taken on the information tax return of Alaska Junk Company.

XIV.

On June 2, 1947, the plaintiff, Sam Schnitzer, filed his petition with The Tax Court of the United States in Docket No. 14208 contending that the determination of the Commissioner of Internal Revenue, to the effect that said accounts receivable of the Oregon Electric Steel Rolling Mills were in fact capital contributions, was erroneous. Upon hearing the matter, the Tax Court of the United States determined the issues in favor of the Commissioner of Internal Revenue and promulgated its finding of fact and opinion on July 14, 1949.

The Court withheld entry of its decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion. The Commissioner filed his computation on October 6, 1949, showing a total liability of \$43,-287.42 due and owing by Sam Schnitzer. On November 7, 1949, the plaintiff, Sam Schnitzer, filed his acquiescence in the computation submitted by the Commissioner. Thereafter, on November 9, 1949, the Court entered its final order and decision determining a deficiency on the part of the plaintiff, Sam

Schnitzer, in income and victory tax for the calendar year 1943, for \$43,287.42 by reason of the said determination.

Thereafter, on January 4, 1950, the plaintiff, Sam Schnitzer, prosecuted an appeal from the decision of The Tax Court of the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit rendered a per curiam opinion under date of July 24, 1950, affirming the decision of the Tax Court. On October 30, 1950, the plaintiff, Sam Schnitzer, petitioned the Supreme Court of the United States for a writ of certiorari to review the judgment of the Court of Appeals. The Supreme Court denied certiorari on January 2, 1951 (340 U. S. 911).

The parties stipulate that the findings of fact and the opinion of the Tax Court and the per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit are to be considered as part of the evidence and record before this Court; that said findings of fact and opinions are reported in the report of the Tax Court proceedings entitled Sam Schnitzer, et al vs. Commissioner of Internal Revenue at 13 T. C. 43, and in the report of the Court of Appeals proceeding of the same name at 183 F. 2d, 70; and that said reports are hereby incorporated and made a part of this stipulation.

XV.

On December 30, 1949, plaintiff, Sam Schnitzer, paid the deficiency asserted as aforesaid and determined by the said judgment, to Hugh H. Earle, the then Collector of Internal Revenue for the District

of Oregon, the amount so paid by plaintiff being \$43,287.42 together with interest on said deficiency in the sum of \$15,142.38, total \$58,329.80.

XVI.

By reason of the income and victory tax payments made on the original return of Sam Schnitzer and the payments made on account of the deficiencies determined by the Commissioner of Internal Revenue and affirmed by The Tax Court of the United States as aforesaid, together with the interest on said deficiencies, the said taxpayer paid income and victory taxes, together with the interest on the deficiencies, in the amount of \$103,938.54 for the taxable year 1943.

XVII.

By virtue of the determination of the Commissioner of Internal Revenue, the decision of the Tax Court of the United States, the affirmance of that decision by the Court of Appeals for the Ninth Circuit and the denial of the petition for *certiorari* by the United States Supreme Court, as aforesaid, it has been adjudicated in effect that the merchandise sold and delivered by Alaska Junk Company to Oregon Electric Steel Rolling Mills were not sales but capital contributions.

As a result of said adjudication, it follows that the "sales" to Oregon Electric Steel Rolling Mills were erroneously carried on the books of the Alaska Junk Company as accounts receivable; they were erroneously included in the gross income of the partnership for 1942 and 1943; the income and victory taxes

paid by the partners including Sam Schnitzer on their distributive shares therefrom under the original returns, were erroneously paid; and the amounts of such "sales" should have been excluded from the gross income of Alaska Junk Company, thus reducing the amount of the net income reportable by said Alaska Junk Company, and thus reducing the amount of income reportable by the deceased, Sam Schnitzer, on his individual income and victory tax return for the taxable year 1943.

XVIII.

On or about June 21, 1951, Sam Schnitzer filed with the Collector of Internal Revenue for the District of Oregon, on Form 843, a claim for refund of the taxes and interest in the sum of \$46,205.61, together with interest thereon as provided by law, a copy of which claim is attached to the complaint herein. It is stipulated that the copy of the claim attached to the complaint herein is a true and correct copy of the claim filed as aforesaid and may be marked and admitted as "Plaintiff's Pre-trial Exhibit No. 1".

XIX.

On or about August 1, 1951, the Commissioner of Internal Revenue notified Sam Schnitzer, by registered mail, that his said claim for refund had been disallowed.

XX.

That the said sum of \$46,205.61 has not been repaid to Sam Schnitzer, or the plaintiffs herein.

XXI.

In its returns for the years 1942 and 1943, the partnership, Alaska Junk Company, reported sales, costs of sales, gross profits, other incomes, total incomes, deductions and net incomes as follows:

	1942	1943
Sales.....	\$ 2,038,384.76	\$ 1,463,363.19
Cost of Sales.....	1,331,840.34	521,662.19
Gross profits.....	\$ 706,544.42	\$ 941,701.00
Other income.....	2,410.12	4,782.31
Total Income.....	\$ 708,954.54	\$ 946,483.31
Deductions.....	(a) 472,831.09	(a) 700,427.60
Net income.....	\$ 236,123.45	\$ 246,055.71

(a) Total deductions claimed for 1942 and 1943 included bad debts in the respective amounts of \$1,971.24 and \$206,008.92.

XXII.

In computing the amount of the refund claimed by the plaintiffs, as set forth in the claim referred to in paragraph XVIII, the plaintiffs eliminated the merchandise sold and delivered to Oregon Electric Steel Rolling Mills in the amount of \$243,975.86 and \$103,365.76 from the gross sales reported in the original returns of the partnership, as aforesaid, thus computing the refund on the basis of gross sales in the amount of \$1,794,408.90 and \$1,359,997.43 for the years 1942 and 1943, respectively.

XXIII.

In computing the amount of refund claimed by plaintiffs, as set forth in the claim referred to in

paragraph XVIII, the plaintiffs used the same cost of sales reported in the original returns of the partnership, that is, \$1,331,840.34 and \$521,662.19 for the years 1942 and 1943, respectively. The plaintiffs did not eliminate the cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, that is, plaintiffs did not reduce the cost of sales as reported in the original returns of the partnership by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

XXIV.

The parties stipulate that the merchandise sold and delivered to Oregon Electric Steel Rolling Mills for the years 1942 and 1943, the amounts of which have been excluded from gross income in computing the refund claimed by the plaintiffs, had a cost of \$159,389.43 and \$36,849.89, respectively.

XXV.

The difference in the amount of income and victory tax of the deceased, Sam Schnitzer, as reported on his original income and victory tax return for 1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for the taxable year 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills, is the sum of \$41,719.77.

The difference in the amount of income and victory tax of the deceased, Sam Schnitzer, as reported on his original income and victory tax return for

1943, together with the deficiency and interest paid, as aforesaid, and the amount of income and victory tax for 1943 after eliminating from gross sales of the partnership (Alaska Junk Company) the merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the cost of said merchandise, is the sum of \$25,143.06.

The parties stipulate that the above computations are true and correct and that in the event the Court shall determine that the prosecution of this action is not barred by Section 322(c) of the Internal Revenue Code of 1939, or by the principle of *res judicata*, and/or the doctrine of collateral estoppel, the judgment to be entered in favor of the plaintiffs, shall be in accordance with and for the amount of overpayment shown in whichever of the above computations is determined by the Court to be applicable under the circumstances, to-wit:

\$41,719.77

or

\$25,143.06

as the case may be;

(plus interest as provided by law).

XXVI.

That in the computation submitted by the Commissioner of Internal Revenue on October 6, 1949, pursuant to Rule 50 of the Tax Court's Rules of Practice, as indicated in paragraph XIV above, the amount of sales which the Tax Court concluded were capital contributions were not eliminated from the gross sales as originally reported by the partner-

ship, nor was the cost of such sales eliminated from the cost of goods sold as originally reported by said partnership. That Sam Schnitzer, on November 7, 1949, filed his acquiescence in the computation submitted by the Commissioner of Internal Revenue, and that on November 9, 1949, the Tax Court entered its final order and decision in the matter. A true and correct copy of said computation, acquiescence and decision is attached hereto, and it is stipulated that the same may be admitted in evidence and marked as "Defendant's Pre-trial Exhibit 1".

XXVII.

The Tax Court proceedings entitled "Sam Schnitzer et al v. Commissioner of Internal Revenue", Docket Nos. 14208, 14209, 14278, 14279, 14280 and 14372, reported in 13 T.C. 43, are as shown and contained in the transcript of record No. 12471, which transcript accompanied the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit. It is stipulated by the parties that said transcript is a true and correct copy of the pleadings, findings of fact, opinion and decision of the Tax Court in said proceedings, and pertinent testimony and evidence adduced therein, together with the petition for review and per curiam opinion and judgment of the Court of Appeals for the Ninth Circuit. It is further stipulated that said copy of the transcript of the Tax Court proceedings as aforesaid, may be marked and admitted in evidence as "Joint Pre-Trial Exhibit No. 1".

Plaintiffs' Contentions

Plaintiffs contend as follows:

I.

That since the partnership reported its income on the accrual basis and the sales made to Oregon Electric Steel Rolling Mills were regarded by the partnership as bona fide sales and carried on the books as accounts receivable, the partnership was, as a matter of law, compelled to report the said sales as a part of its gross income and to include the same as gross income in reporting the distributive shares of the partners and in the net income of the partnership; that the partners were, as a matter of law, compelled to report in their individual income tax returns as income, the amount reported by the partnership as their distributive shares which included the income from the sales made to said Oregon Electric Steel Rolling Mills and the individual partners, including Sam Schnitzer, did include in his individual income tax return for the year 1943, his distributive share of the income of the partnership as it was reported by the partnership in its information return, which included income from the sales to Oregon Electric Steel Rolling Mills as aforesaid, and Sam Schnitzer paid the income taxes and victory taxes due thereon; that since the Commissioner of Internal Revenue disallowed the loss resulting from the failure of the Oregon Electric Steel Rolling Mills to pay said account receivable for the merchandise sold to it as aforesaid, and the Commissioner elected to treat

the delivery of the merchandise by the partnership to said corporation as a contribution to capital of the corporation, and determined a deficiency by reason of the disallowance of said bad debt loss deduction, and the Court affirmed the determination of the Commissioner, the payment of taxes on the portion of the income determined to be capital contribution, was erroneous and resulted in an overpayment in that the delivery of said merchandise by the partnership to the said corporation could not be sales and capital contributions at the same time, and since said delivery of merchandise would not constitute sales, it was improperly included in the net income and the taxes paid thereon were erroneously paid.

II.

This action to recover the taxes erroneously paid as aforesaid, is not barred by Section 322(c) of the Internal Revenue Code, but comes within the provision of Subdivision 2 of the exceptions to Section 322(c) of the Internal Revenue Code, in that the amount collected was in excess of the amount computed in accordance with the decision of the Board (Tax Court); that the claim for refund did not accrue until after the affirmance of the Commissioner's determination by the Courts and the payment of the deficiency determined thereby, and the Tax Court of the United States had no jurisdiction, referred to herein, to determine any refund, either in the original decision or in the judgment entered upon the computation under Rule 50.

III.

The judgment of the Tax Court of the United States is not *res adjudicata* in that the subject matter of the proceeding in the Tax Court of the United States was not the same as in this action and the proceedings in the two cases were between different parties. The Tax Court of the United States had no jurisdiction under the pleadings in that proceeding to determine the present claim for refund.

Defendant's Contentions

I.

This Action is Barred by Section 322(c) of the Internal Revenue Code of 1939.

The present suit involves the same tax for the same taxable year 1943 as was involved in the proceedings instituted by the plaintiffs and related taxpayers before the Tax Court of the United States for redetermination of the deficiency in respect of their income tax for that taxable year.

Under the circumstances this action is barred by Section 322(c) of the Code. With certain exceptions not applicable here, the statute expressly provides that when a petition is filed with the Tax Court, which was the case here, no suit shall be instituted in any court for recovery of any part of "the tax for the taxable year" in respect of which the Commissioner of Internal Revenue has determined a deficiency.

The important thing with this statute is the fil-

ing of a petition in the Tax Court, rather than the decision of the Court. The taxpayer who elects to invoke the jurisdiction of the Tax Court must accept this consequence, and it is clear under the decided cases that the plaintiffs have no right to sue the United States in this case.

II.

The Determination of the Tax Court Is Res Judicata

In the alternative, if this Court does not consider that Section 322(c) of the 1939 Code effectively bars this action, then it is barred by an application of the principles of res judicata. The same tax liability, the same tax year, and the same parties or their privies are involved in the instant suit as in the prior adjudication.

Upon hearing the same matter in the prior proceedings, the Tax Court decided the issues raised by the pleadings in favor of the Commissioner of Internal Revenue and promulgated its findings of fact and its opinion on July 14, 1949 (13 T.C. 43). The Court withheld entry of its final order and decision, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability pursuant to the Court's opinion.

The Commissioner filed his computation on October 6, 1949, showing a total liability of \$42,273.99 due and owing by the petitioners. Sam Schnitzer, along with the other petitioners, had ample opportunity under Rule 50 to present their objections to

the Commissioner's computation of their tax liability in accordance with the Court's opinion.

Instead of objecting to the Commissioner's computation, petitioners acquiesced on November 7, 1949, in the computation submitted to the Court by the Commissioner, and the Court entered its order and decision accordingly on November 9, 1949. This final order and decision, determining a deficiency of \$42,273.99 due and owing by said plaintiffs, was affirmed on January 4, 1950, by the Court of Appeals for the Ninth Circuit (183 F.2d 70).

It is now too late, it is submitted, for the plaintiffs and the other taxpayers to ask that any errors in the Rule 50 computation be corrected. The decision of the Tax Court which was affirmed by the Court of Appeals for this Circuit is a final decision which set at rest forever all questions litigated or which might have been litigated.

The plaintiffs, it is submitted, have already clearly had their day in Court, and should not be permitted to relitigate the same issues in this Court, as a plain matter of justice and equity.

III.

Plaintiffs' Recovery is Properly Denied on
Grounds of Estoppel.

In the alternative, if this Court does not consider that Section 322(c) and/or the principle of res judicata effectively barred this action, then it is contended that the plaintiffs are estopped by the decision of the Tax Court and by their acquiescence in the computation of the tax deficiency so ordered

and decided by the Tax Court, as aforesaid, from any recovery herein.

Issues of Fact

I.

There are no issues of fact for determination.

Issues of Law

I.

Whether this action is barred by Section 322(c) of the Internal Revenue Code of 1939, because of the prior proceedings instituted before the Tax Court of the United States under the provisions of Section 272(a) of said Code?

II.

Whether, in the alternative, the decision of the Tax Court of the United States, affirmed by the Court of Appeals for the Ninth Circuit, is *res judicata* upon a suit for the recovery of any part of the tax paid in satisfaction of the deficiency in tax so determined in the Tax Court proceedings?

III.

Which of the computations set forth in paragraph XXV of this Pre-Trial Order is applicable under the circumstances in the event the Court shall determine that this action is not barred under Section 322(c) of the Internal Revenue Code of 1939 or by the principle of *res judicata*, that is, whether the amount of overpayment is \$41,719.77, as contended

by the plaintiffs, or \$25,143.06 as contended by the defendant?

Plaintiffs' Exhibits

Plaintiffs' Exhibit No. 1: Claim for Refund.

Defendant's Exhibits

Defendant's Exhibit No. 1: Computation, Acquiescence and Decision.

Joint Exhibits

Joint Exhibit No. 1: Transcript of the Record in Tax Court proceedings titled: "Sam Schnitzer et al v. Commissioner of Internal Revenue, Docket Nos. 14208, 14209, 14278, 14279, 14280, 14372.

Certain exhibits have been identified and received as pre-trial exhibits, the parties agreeing, with the approval of the Court, that no further identification of said exhibits is necessary and it is stipulated that said exhibits shall be received in evidence as a part of the stipulated facts.

The Parties hereto waive trial by jury and agree to the foregoing Pre-Trial Order and stipulate that this action shall be submitted to the Court for determination upon this Pre-Trial Order and the stipulated facts set forth therein.

The Court being fully advised in the premises;
now

Orders, that the foregoing Pre-Trial Order shall not be amended except by consent of both Parties or to prevent manifest injustice; and it is further

Ordered, that this Pre-Trial Order supersedes all pleadings.

Dated at Portland, Oregon, this 28th day of February, 1955.

/s/ GUS J. SOLOMON,
Judge

Approved:

/s/ S. J. Bischoff

/s/ R. S. Jacob

Attorneys for Plaintiff

/s/ C. E. Luckey

Attorney for Defendant

/s/ John D. Picco

Of Counsel for Defendant

[Endorsed]: Filed Feb. 28, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause having duly come on for trial, plaintiff appeared herein by S. J. Bischoff, his Attorney, the defendant appeared herein by C. E. Luckey, United States Attorney for the District of Oregon, and by John D. Picco, its attorneys; whereupon the cause was submitted to the Court upon a stipulation of facts contained in the Pre-trial Order entered herein on the 28th day of February, 1955, and upon the exhibits described therein, briefs of the respective parties were submitted and argu-

ment made to the Court, the Court now makes and files herein the following:

Findings of Fact

The Court does hereby adopt, and makes as its findings of fact, all of the facts contained in the stipulation of the parties incorporated in the aforesaid Pre-trial Order as if herein fully and at length set forth.

Upon the aforesaid findings of fact, the Court does hereby make and file herein the following:

Conclusions of Law

I.

That the claim for refund filed by the plaintiff and described in the findings of fact is not barred by the provisions of Section 322(c) of the Internal Revenue Code and the Court has jurisdiction of this suit upon said claim by virtue of the exception No. 2 to Section 322(c) of the Internal Revenue Code.

II.

The plaintiffs' cause of action is not barred by the principles of res judicata or collateral estoppel.

III.

In computing the amount of refund to which plaintiffs are entitled, there should be eliminated the cost of merchandise sold and delivered to Oregon Electric Steel Rolling Mills and the costs of sales reported in the original return should be reduced

by the actual cost of the merchandise sold and delivered to Oregon Electric Steel Rolling Mills.

IV.

Plaintiffs are entitled to a judgment against the defendant for the sum of \$41,719.77 with interest thereon at the rate of 6% per annum from December 30, 1949, to the date of payment as required by law, together with their costs and disbursements incurred herein.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1955.

In the District Court of the United States for the
District of Oregon

Civil No. 7102

MANUEL SCHNITZER, HAROLD SCHNITZER,
LEONARD SCHNITZER, Executors of
the Estate of Sam Schnitzer, deceased,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Upon the findings of fact and conclusions of law
duly made and filed herein, it is

Ordered and Adjudged that the plaintiffs Manuel
Schnitzer, Harold Schnitzer, Leonard Schnitzer, Ex-
ecutors of the Estate of Sam Schnitzer, deceased, do
have judgment for and recover of and from the
United States of America, the defendant herein, the
sum of \$41,719.77 with interest thereon at the rate
of 6% per annum from December 30, 1949, to date
of payment as required by law, and that plaintiffs
have judgment for their costs and disbursements in-
curred herein in the sum of \$. as taxed by the
Clerk of this Court.

Dated: August 19, 1955.

/s/ CLAUDE McCOLLOCH,
Judge

Acknowledgment of Service attached.

[Endorsed]: Filed Aug. 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Manuel Schnitzer, Harold Schnitzer, Leonard Schnitzer, Executors of the Estate of Sam Schnitzer, deceased, Plaintiffs, and to Jacob, Jones & Brown and S. J. Bischoff, their Attorneys:

Notice is hereby given that the United States of America, defendant above-named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on August 19, 1955 in favor of plaintiffs and against defendant.

Dated October 14, 1955.

C. E. LUCKEY,
U. S. Attorney, District of Oregon
/s/ VICTOR E. HARR,
Asst. U. S. Attorney,
Of Attorneys for Defendant

[Endorsed]: Filed Oct. 14, 1955.

In the United States District Court
for the District of Oregon

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Com-

plaint; Defendant's motion to dismiss complaint; Order consolidating cases for hearing; Record of hearing on motion to dismiss complaint; Answer; Stipulation for entry of order consolidating actions for trial; Pre-trial order; Findings of fact and conclusions of law; Judgment; Notice of appeal; Motion for order extending time to docket appeal; Order extending time to docket appeal; Designation of contents of record on appeal; and Transcript of docket entries, constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 7102, in which The United States of America is the defendant and the appellant and Manuel Schnitzer, Harold Schnitzer, Leonard Schnitzer, Executors of the Estate of Sam Schnitzer, deceased, are the plaintiffs and appellees; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant and in accordance with the rules of this court.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 25th day of January, 1956.

[Seal] R. DE MOTT,
 Clerk

/s/ By THORA LUND,
 Deputy

[Endorsed]: No. 15015. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Manuel Schnitzer, Harold Schnitzer and Leonard Schnitzer, Executors of the Estate of Sam Schnitzer, deceased, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: January 26, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 15011

United States of America, Appellant, vs. Monte L.
Wolf, Executor of the Estate of Harry J. Wolf,
Deceased, Appellee.

No. 15012

United States of America, Appellant, vs. Monte L.
Wolf, Transferee of the Estate of Jennie Wolf,
Deceased, Appellee.

No. 15013

United States of America, Appellant, vs. Blossom
M. Grayson, Transferee of the Estate of Jennie
Wolf, Deceased, Appellee.

No. 15014

United States of America, Appellant, vs. Charlotte
C. Cohon, Transferee of the Estate of Jennie
Wolf, Deceased, Appellee.

No. 15015

United States of America, Appellant, vs. Manuel
Schnitzer, Harold Schnitzer, Leonard Schnitzer,
Executors of the Estate of Sam Schnitzer, De-
ceased, Appellees.

MOTION TO CONSOLIDATE CASES FOR
BRIEFS AND HEARING

Comes now the appellant, United States of Amer-
ica, by and through C. E. Luckey, United States
Attorney for the District of Oregon, and Victor E.
Harr, Assistant United States Attorney, and moves
the Court for an order of consolidation of the above-
entitled cases for hearing and determination in the
above-entitled Court, and further that a consolid-

ated brief be permitted to be filed herein in respect to all of the above-entitled causes.

In support of this motion appellant represents that the said causes were consolidated for trial and determination in the court below and that the record submitted was considered by the Court as applicable to a determination of each of the said causes; that the said actions all grew out of a consolidated proceeding before the Tax Court of the United States in the case of Sam Schnitzer et al. vs. Commissioner, 13 T.C. 43, and the decision of that Court in that proceeding.

Dated at Portland, Oregon this 1st day of February, 1956.

C. E. LUCKEY,

U. S. Attorney for the District of
Oregon

/s/ VICTOR E. HARR,

Asst. U. S. Attorney

So Ordered:

/s/ WILLIAM DENMAN,

United States Circuit Court Judge

/s/ WM. HEALY,

/s/ WALTER L. POPE,

Judges, U. S. Court of Appeals for
the Ninth Circuit

Certificate of Service by Mail attached.

[Endorsed]: Filed Feb. 6, 1956. Paul P. O'Brien,
Clerk.

In the United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant

v.

MONTE L. WOLF, Executor of the Estate
of Harry J. Wolf, deceased, Appellee

UNITED STATES OF AMERICA, Appellant

v.

MONTE L. WOLF, Transferee of the Estate
of Jennie Wolf, deceased, Appellee

UNITED STATES OF AMERICA, Appellant

v.

BLOSSOM M. GRAYSON, Transferee of the
Estate of Jennie Wolf, deceased, Appellee

UNITED STATES OF AMERICA, Appellant

v.

CHARLOTTE C. COHON, Transferee of the
Estate of Jennie Wolf, deceased, Appellee

UNITED STATES OF AMERICA, Appellant

v.

MANUEL SCHNITZER, HAROLD SCHNITZER and
LEONARD SCHNITZER, Executors of the Estate
of Sam Schnitzer, deceased, Appellees

On Appeal from the Judgments of the United States
District Court for the District of Oregon

BRIEF FOR THE APPELLANT

CHARLES K. RICE,
Assistant Attorney General

LEE A. JACKSON,
A. F. PRESCOTT,
KENNETH E. LEVIN,
Attorneys,

C. E. LUCKEY,
United States Attorney

VICTOR E. HARR,
Assistant United States Attorney

Department of Justice
Washington 25, D.C.

FILED

JUN 20 1956

PAUL P. O'BRIEN, CLERK

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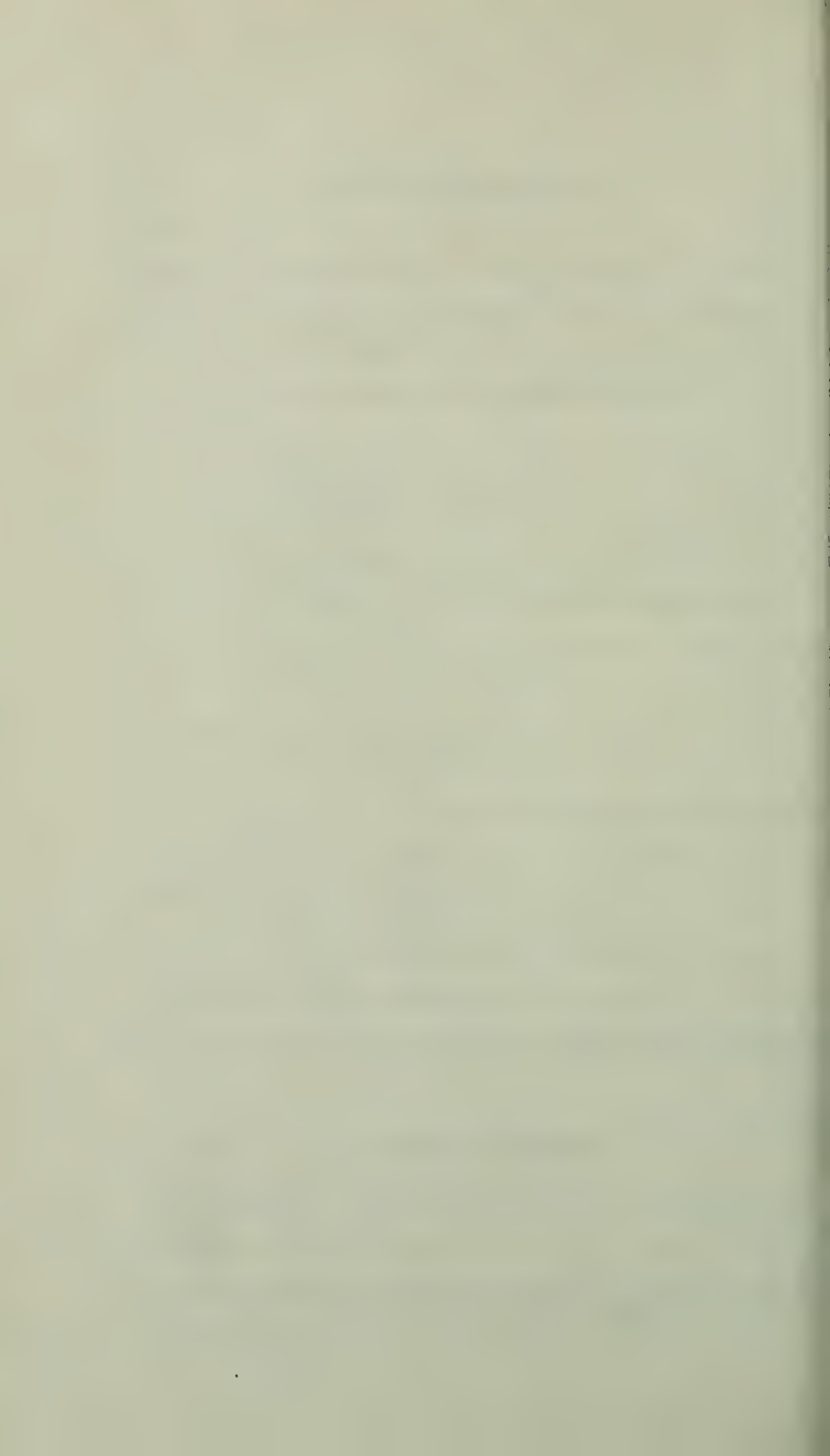
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In the United States
Court of Appeals
for the Ninth Circuit

No. 15,011

UNITED STATES OF AMERICA, Appellant
v.
MONTE L. WOLF, Executor of the Estate
of Harry J. Wolf, deceased, Appellee

No. 15,012

UNITED STATES OF AMERICA, Appellant
v.
MONTE L. WOLF, Transferee of the Estate
of Jennie Wolf, deceased, Appellee

No. 15,013

UNITED STATES OF AMERICA, Appellant
v.
BLOSSOM M. GRAYSON, Transferee of the
Estate of Jennie Wolf, deceased, Appellee

No. 15,014

UNITED STATES OF AMERICA, Appellant
v.
CHARLOTTE C. COHON, Transferee of the
Estate of Jennie Wolf, deceased, Appellee

No. 15,015

UNITED STATES OF AMERICA, Appellant
v.
MANUEL SCHNITZER, HAROLD SCHNITZER and
LEONARD SCHNITZER, Executors of the Estate
of Sam Schnitzer, deceased, Appellees

On Appeal from the Judgments of the United States
District Court for the District of Oregon

BRIEF FOR THE APPELLANT

OPINION BELOW

The District Court wrote no opinion.

JURISDICTION

These appeals involve federal income and victory taxes. The taxes for 1942 and 1943 were paid on or before March 15, 1943, and March 15, 1944, respectively:

Docket No.	Taxpayer	Record references
15,011	Monte L. Wolf, Executor	R. 43-44
15,012	Monte L. Wolf, Transferee	R. 42-43
15,013	Blossom M. Grayson, Transferee	R. 5-6
15,014	Charlotte C. Cohon, Transferee	R. 5-6
15,015	Manuel Schnitzer, Harold Schnitzer, and Leonard Schnitzer, Executors	R. 5-6

The Tax Court held that taxpayers were liable for deficiencies for the year 1943. These deficiencies were paid on December 30, 1949:

Docket No.	Taxpayer	Record references
15,011	Monte L. Wolf, Executor	R. 47
15,012	Monte L. Wolf, Transferee	R. 46
15,013	Blossom M. Grayson, Transferee	R. 9
15,014	Charlotte C. Cohon, Transferee	R. 9
15,015	Manuel Schnitzer, Harold Schnitzer, and Leonard Schnitzer, Executors	R. 8-9

Taxpayers then made claims for refunds for the year 1943^{1/} on June 21, 1951, and on August 1, 1951, the Commissioner notified them that their claims had been disallowed:

Docket No.	Taxpayer	Record references
15,011	Monte L. Wolf, Executor	R. 48-49
15,012	Monte L. Wolf, Transferee	R. 47-48
15,013	Blossom M. Grayson, Transferee	R. 10-11
15,014	Charlotte C. Cohon, Transferee	R. 10-11
15,015	Manuel Schnitzer, Harold Schnitzer, and Leonard Schnitzer, Executors	R. 10

On July 31, 1953, taxpayers brought these suits pursuant to Section 3772(a) of the Internal Revenue Code of 1939. Jurisdiction is conferred on the District Court by 28 U.S.C., Section 1346. Judgments of recovery for taxpayers were entered on August 19, 1955, as follows:

Docket No.	Taxpayer	Amount	Record references
15,011	Monte L. Wolf, Executor	\$41,608.89	R. 71, 76
15,012	Monte L. Wolf, Transferee	13,025.09	R. 65, 69
15,013	Blossom M. Grayson, Transferee	13,025.09	R. 25-26
15,014	Charlotte C. Cohon, Transferee	13,025.09	R. 25-26
15,015	Manuel Schnitzer, Harold Schnitzer, and Leonard Schnitzer, Executors	41,719.77	R. 25

Notices of appeal were filed on October 14, 1955:

^{1/}Actually both the years 1942 and 1943 are involved but due to the application of the Current Tax Payment Act of 1943, c. 120, 57 Stat. 126, only the year 1943 is officially in issue.

Docket No.	Taxpayer	Record reference
15,011	Monte L. Wolf, Executor	R. 72
15,012	Monte L. Wolf, Transferee	R. 66
15,013	Blossom M. Grayson, Transferee	R. 26
15,014	Charlotte C. Cohon, Transferee	R. 26
15,015	Manuel Schnitzer, Harold Schnitzer, and Leonard Schnitzer, Executors	R. 26

Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether these suits are precluded by Section 322(c) of the Internal Revenue Code of 1939, since the Commissioner has mailed the taxpayers notice of deficiency and they filed petitions with the Tax Court for the same year involved in these suits.

2. In the alternative whether these suits are barred by the doctrine of *res judicata*.

3. If the taxpayers are entitled to refund, whether the District Court figured the amounts of refund correctly.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * *

(g) *Capital Losses.*—

(1) *Limitation.*—Losses from sales or exchanges of capital assets shall be allowed only to the extent provided in section 117.

* * * *

(2) *Securities becoming worthless.*—If any securities (as defined in paragraph (3) of this subsection) become worthless during the taxable year and are capital assets, the loss resulting therefrom shall, for the purpose of this chapter, be considered as a loss from the sale or exchange, on the last day of such taxable year, of capital assets.

* * * *

(26 U.S.C. 1952 ed., Sec. 23.)

SEC. 117. CAPITAL GAINS AND LOSSES.

* * * *

(d) [As amended by Sec. 150(c) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Limitation on Capital Losses.*

(2) *Other taxpayers.*—In the case of a taxpayer, other than a corporation, losses from sales or exchanges of capital assets shall be allowed only to the extent of the gains from such sales or exchanges, plus the net income of the taxpayer of \$1,000, whichever is smaller. For purposes of this paragraph, net income

shall be computed without regard to gains or losses from sales or exchanges of capital assets.

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

SEC. 322. REFUNDS AND CREDITS

* * * *

(c) *Effect of Petition to Tax Court.* If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272 (a) and if the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

(1) As to overpayments determined by a decision of the Tax Court which has become final; and

(2) As to any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final; and

(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in any such suit for refund the decision of the Tax Court which has become final, as to whether

such period has expired before the notice of deficiency was mailed, shall be conclusive.

(d) [As amended by Sec. 14(d) of the Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Overpayment Found by Tax Court.* — If the Tax Court finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the Tax Court shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Tax Court has become final, be credited or refunded to the taxpayer. * * *

*

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(26 U.S.C. 1952 ed., Sec. 322.)

STATEMENT

During the years 1942 and 1943, and for many years prior thereto, Sam Schnitzer, his wife, Rose Schnitzer, Harry J. Wolf and his wife, Jennie Wolf, operated the Alaska Junk Company of Portland, Oregon, as a copartnership. (R. 42-

43.)² During 1942 and 1943, Alaska Junk delivered merchandise to Oregon Electric Steel Rolling Mills, and the amount of these items was carried on the books of Alaska Junk as accounts receivable. (R. 43-44.) Alaska Junk, on its partnership return for 1943, claimed as a bad debt deduction \$202,350.60, the balance carried on its books as accounts receivable from Oregon Electric. (R. 44). The Commissioner determined deficiencies on the grounds that Rose Schnitzer and Jennie Wolf were not bona fide partners for tax purposes during the years 1942 and 1943 (Tax Court R. 53),³ and that the bad debt deduction in 1943 was not allowable. (R. 45). The partners (or their transferees or executors) petitioned the Tax Court for redetermination of their income taxes for the years 1942 and 1943. (Tax Court R. 2-15.) The Tax Court held that Rose Schnitzer and Jennie Wolf were bona fide partners for tax purposes and that Alaska Junk had supplied goods to Oregon Electric at cost, but disallowed the bad debt deduction on the ground that the amounts charged to Oregon Electric Steel Rolling Mills were contributions to capital and not the result of sales.

² All further record references are to the record in No. 15,011, *United States of America v. Monte L. Wolf, Executor*, unless indicated otherwise.

³ References to Tax Court record are to the record in the case of *Schnitzer v. Commissioner*, Court of Appeals Docket No. 12,471. (Joint Pre-Trial Ex. No. 1.)

Schnitzer v. Commissioner, 15 T.C. 43, affirmed *per curiam*, 183 F. 2d 70 (C.A. 9th), certiorari denied, 340 U.S. 911.

The Tax Court withheld entry of its decisions, pursuant to Rule 50 of its Rules of Practice, for the purpose of permitting the parties to submit computations of the proper tax liability. The Commissioner filed his computation and the partners (or their transferees or executors) acquiesced in the computation. The Tax Court thereupon entered its final orders and decisions determining deficiencies on the part of the taxpayers. Upon appeal by the taxpayers this Court affirmed *per curiam*, 183 F. 2d 70, certiorari denied, 340 U.S. 911. (R. 45-46.)

The pre-trial order provides that as a result of the above adjudication, the "sales" to Oregon Electric were erroneously carried on the books of the Alaska Junk Company as accounts receivable. They were erroneously included in the gross income of the partnership for 1942 and 1943. The income and victory taxes paid by the partners on their distributive shares therefrom under the original returns were erroneously paid, and the amounts of such "sales" should have been excluded from the gross income of Alaska Junk Company, thus reducing the amount of the net income reportable by Alaska Junk, and thus reducing the amount of income reportable by the partners on their individual returns. (R. 47-48.) The pre-trial order also provided that the taxpayers did not eliminate the costs of merchandise "sold and delivered" to Oregon,

that is, taxpayers did not reduce the costs of sales reported in the original returns of the partnership by the actual costs of the merchandise "sold and delivered to Oregon." (R. 50.) In the pre-trial order the parties stipulated alternative computations of amounts which the taxpayers would be entitled to recover in the event the court should determine that the prosecution of this action is not barred by Section 322(c) of the 1939 Code, or by the principle of *res judicata*, and/or the doctrine of collateral estoppel. The taxpayers' computation is one derived without reduction of the cost of "sales" as reported in the returns of the partnership by the actual costs of the merchandise delivered to Oregon; and the Government's computation is one which reduces the costs of "sales" as reported in the partnership returns by the actual costs of such merchandise. (R. 50-51.)

The partners (or their executors or transferees) filed claims for refund with the Collector of Internal Revenue for the District of Oregon on June 21, 1951. On August 1, 1951, the claims were disallowed. (See record references under section of brief entitled "Jurisdiction.") These actions followed.

STATEMENT OF POINTS TO BE URGED

1. The District Court erred in holding that taxpayers were not barred from claiming refunds and from bringing

these suits by Section 322(c) of the Internal Revenue Code of 1939.

2. The District Court erred in holding that taxpayers' suits were not barred by the doctrine of *res judicata*.

3. The District Court erred in holding that taxpayers' net profit should be adjusted by deducting the full sales price of goods "sold" to Oregon Electric from Alaska Junk's total gross sales without deducting from the total cost of goods sold the cost of the goods which it held should be eliminated from the gross sales.

SUMMARY OF ARGUMENT

These suits are barred by Section 322(c) of the Internal Revenue Code of 1939 because the Commissioner mailed the taxpayers (or their decedents or transferors) notices of deficiency for the year involved here and the taxpayers filed petitions with the Tax Court for redetermination of the asserted deficiencies. Taxpayers cannot bring themselves within the second exception to Section 322(c) under the broadest interpretation of that exception. Furthermore, the finding of the Tax Court in the previous actions that Alaska Junk supplied Oregon Electric merchandise at cost is diametrically opposed to taxpayers' position here. Taxpayers are seeking to deduct the same item which they tried unsuccessfully to deduct in the previous actions before the Tax Court. These suits are barred by mere reason of the fact that tax-

payers have already petitioned the Tax Court with respect to the tax year involved, and do not depend upon whether taxpayers did or could have raised the issue involved here.

In the alternative, if these suits are not precluded by Section 322(c), they are barred by the doctrine of *res judicata*. The purpose of that doctrine is the saving of judicial time and the establishment of certainty in legal relations. When a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Income tax liability for any one year is a single cause of action. Thus when taxpayers litigated their liability for the year 1943 before the Tax Court, they precluded themselves from re-litigating their liability for that year as to any matter which might have been raised in the prior litigation. We submit that the issues raised in the present actions could and should have been presented in the prior suits as an alternative issue to the effect that if the transfers of merchandise to Oregon Electric were held to be contributions to capital and not sales, then the taxes paid on the profit from those "sales" were erroneously paid. Not having raised this issue when they could have, taxpayers should not be permitted to do so now.

Alaska Junk in its returns treated the delivery of merchandise to Oregon Electric as sales. Thus it reported in its net

income only the gains from such "sales," that is, the difference between the "gross sales" price and the cost of the merchandise. It carried the "gross sales" price as accounts receivable and in 1943 deducted the portion it had not been paid as a bad debt. The Commissioner's determination, upheld by the Tax Court, denied the deduction as a bad debt on the ground that the deliveries of this merchandise were capital contributions to Oregon Electric, and not sales. Taxpayers argue that the income they reported from those sales should be reduced by deducting from the total gross sales of Alaska Junk the "gross sales" price of merchandise "sold" to Oregon Electric, while leaving the cost of those goods "sold" included in Alaska Junk's total cost of goods figure. The Government submits that it is clear that the cost of goods "sold" to Oregon Electric must be deducted from Alaska Junk's total cost of goods sold as well. Since the goods were contributed to the capital of Oregon Electric and not sold, they cannot remain in the cost of goods sold figure. To leave them in that figure while deducting their selling price from the gross sales figure would produce an erroneous net profit figure.

The ruling in the former action is *res judicata* that the partnership suffered no loss upon the merchandise furnished to Oregon; and that any loss therefrom was a capital loss to the individual taxpayers as stockholders of Oregon, deduction of which is limited. Indeed, the Tax Court's finding in the former action that the merchandise was furnished at cost

is *res judicata* and precludes the assertion here of any adjustment of partnership income as returned.

ARGUMENT

I

THESE ACTIONS ARE BARRED BY SECTION 322 (c), OF THE INTERNAL REVENUE CODE OF 1939 BECAUSE THE COMMISSIONER MAILED THE TAXPAYERS NOTICES OF DEFICIENCY, AND TAXPAYERS FILED PETITIONS FOR REDETERMINATION WITH THE TAX COURT. THE AMOUNTS SOUGHT BY TAXPAYERS HERE WERE NOT COLLECTED IN EXCESS OF AMOUNTS COMPUTED IN ACCORDANCE WITH THE DECISIONS OF THE TAX COURT, BUT ARE AMOUNTS COMPUTED IN ACCORDANCE WITH THE DECISIONS OF THE TAX COURT.

Under the Revenue Act of 1924, c. 234, 43 Stat. 253, no direct judicial review of proceedings before the Board of Tax Appeals was provided. However, both the taxpayer and the Government had the right to test the correctness of the Board's action in any court of competent jurisdiction. This procedure was changed in the Revenue Act of 1926, c. 27, 44 Stat. 9, by Section 284(d), which became Section 322(c) of the 1939 Code, *supra*, and a direct judicial review of the Board's decisions by the Courts of Appeals and the Supreme

Court was substituted, and the Board's jurisdiction was enlarged to enable it to consider deficiencies beyond those shown in the Commissioner's notice, and also to determine that the taxpayer not only did not owe the tax but had overpaid it. *Bankers' Reserve Life Co. v. United States*, 44 F. 2d 1000, 1003 (C. Cls.), certiorari denied, 283 U.S. 836.

Section 322(c) of the Internal Revenue Code of 1939, *supra*, provides that, if the Commissioner has mailed to the taxpayer a notice of deficiency under Section 272(a) and if the taxpayer files a petition with the Tax Court within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court, with three exceptions. Thus where a taxpayer petitioned the Board of Tax Appeals to redetermine an asserted deficiency for 1925, and the Board upheld the Commissioner, taxpayer was precluded from paying the deficiency and then bringing a suit for refund of it in District Court. *Cook v. United States*, 108 F. 2d 804 (C.A. 5th), certiorari denied, 310 U.S. 636. Likewise where a taxpayer's petition for redetermination was dismissed by the Tax Court for lack of prosecution, and the Tax Court determined that deficiencies existed as the Commissioner had asserted, the taxpayer was barred from paying the deficiency and suing for refund in the District Court. *Fiorentino v. United States*, 226 F. 2d 619 (C.A. 3d).

Furthermore, the Tax Court may determine overpayments (Section 322(d), *supra*), so that where a taxpayer petitions the Tax Court to redetermine an asserted deficiency, and he thinks that he has overpaid, he must show it at that time. Should he fail to do so, he would be barred from any subsequent suit in another court for refund. *Staten Island Shipbuilding Co. v. United States*, 31 F. Supp. 166 (C. Cls). This is true even though the ground upon which a refund is sought is entirely distinct from the ground upon which the Commissioner has asserted a deficiency. *Bear Mill Mfg. Co. v. United States*, 93 F. Supp. 988 (S.D. N.Y.). These are the general principles with respect to Section 322(c).

The Government believes that the present actions are barred by Section 322(c) in that taxpayers filed petitions in the Tax Court, and hence no credit or refund is now allowable, nor can any suit be instituted. In the court below, taxpayers argued, and the court held, that they could sue by reason of the second exception to Section 322(c) which permits suit for recovery of "any amount collected in excess of an amount computed in accordance with the decision of the Tax Court which has become final." Taxpayers contend that the taxes they paid on the alleged profit from "sales" to Oregon Electric are amounts collected in excess of an amount computed in accordance with the decisions of the Tax Court. We submit, however, that taxpayers cannot bring themselves within exception (2) provided in Section 322(c) under the broadest interpretation of that exception. Taxpayers' position

here is not only not in accordance with the decision in the previous actions, but on the contrary, the findings of the Tax Court in the former suits, which were specifically attacked in this Court upon appeal, and which were affirmed, are diametrically opposed to their position and preclude recovery in the instant suits.

In the former actions, the Tax Court found as a fact (13 T.C. 43, 49) that "From October 1941 Alaska Junk made numerous advances of cash to Oregon Steel, supplied it with goods of various kinds *at cost* * * *." (Italics supplied.) When taxpayers appealed the Tax Court decisions to this Court, they specified that the Tax Court had erred in finding that the goods were supplied at cost (Appellants' Br. 7, 19, *Schnitzer v. Commissioner* (Docket Nos. 12,471-12,476)), but this Court affirmed the Tax Court *per curiam*, 183 F 2d 70. Yet taxpayers' claims here are grounded upon the theory that these goods were supplied by Alaska Junk *at a profit*. This is clearly inconsistent with the decisions in the former cases. It is also to be noted that taxpayers assert here that they are entitled to deduct \$347,341.62 from the partnership income as returned. This is the exact amount—the same item—which taxpayers asserted in their brief in the former actions (Appellants' Br. 20, *Schnitzer v. Commissioner*) in their argument attacking the Tax Court's findings that the goods were furnished at cost.

Further, at the close of the Tax Court proceedings, the Commissioner filed his computation showing taxpayers' total liability, and taxpayers acquiesced therein. (R. 45-46.) It must be assumed that everything which would affect taxpayers' liability was considered, whether raised by the petitions and answers or not. *Lehigh Valley Trust Co. v. United States*, 34 F. Supp. 839, 841 (E.D. Pa.). There is then no amount collected in excess of an amount computed in accordance with the decisions of the Tax Court. All the amounts collected are precisely in accordance with the decisions of the Tax Court, and these suits are accordingly barred.

That this is the result intended by Congress is apparent from the report of the Senate Committee on Finance discussing Section 284(d) of the Revenue Act of 1926, c. 27, 44. Stat. 9, predecessor of Section 322(d) of the Internal Revenue Code of 1939, as follows (S. Rep. No. 52, 69th Cong., 1st Sess., pp. 25-26 (1939-1 Cum. Bull. (Part 2) 332, 351)):

The House bill also provides in section 281(d) that when the deficiency letter has been sent to the taxpayer, whether or not he takes the case to the Board of Tax Appeals, his right to claim or sue for a refund for the year to which the deficiency letter relates is forever barred. This provision seems to the committee too drastic, and it is accordingly proposed in section 284(d) of the bill that the taxpayer's right to claim and sue for refund shall be barred only if he takes the case to the Board, thus preserving to him the option of paying the tax and then proceed-

ing before the Department and the courts to recover any excess payments by a claim or suit for refund.

But if he does elect to file a petition with the Board his entire tax liability for the year in question (except in case of fraud) is finally and completely settled by the decision of the Board when it has become final, whether the decision is by findings of fact and opinion, or by dismissal, as in case of lack of prosecution, insufficiency of evidence to sustain the petition, or on the taxpayer's own motion. The duty of the Commissioner to assess the deficiency thus determined is mandatory, and no matter how meritorious a claim for abatement of the assessment or for refund he cannot entertain it, nor can suit be maintained against the United States or the collector. Finality is the end sought to be attained by these provisions of the bill and the committee is convinced that to allow the reopening of the question of the tax for the year involved either by the taxpayer or by the Commissioner (save in the sole case of fraud) would be highly undesirable.

The Court of Claims has stated also (*Bankers' Reserve Life Co. v. United States supra*, p. 1005) that—

Section 284(d) gives effect to the intent of Congress to attain finality to proceedings instituted before the Board of Tax Appeals by barring the right of a taxpayer who takes his case there to bring suit for refund of any part of the taxes paid for the year for which the appeal is taken to the board.

The impossibility of taxpayers' position in the actions at bar does not depend upon whether or not they could have

raised the present issue when they were before the Tax Court. They are barred here simply because they petitioned the Tax Court. *Merrill v. United States*, 152 F. 2d 74 (C.A. 2d). This is forcefully shown by the case of *Elbert v. Johnson*, 164 F. 2d 421 (C.A. 2d), in which the Commissioner asserted a deficiency against the taxpayer for the year 1938. Taxpayer had also erroneously paid a gift tax in 1938. He petitioned the Tax Court for a redetermination, asking that the erroneously paid gift tax be credited against the alleged deficiency. The Tax Court held that it lacked jurisdiction to allow the mistakenly paid gift tax as a credit. Taxpayer paid the deficiency and then sued in the District Court for refund of the gift tax. The Court of Appeals held that Section 322(c) prevented the suit, saying (p. 424):

It is not the decision which the Tax Court makes but the fact that the taxpayer has resorted to that court which ends his opportunity to litigate in the District Court his tax liability for the year in question. * * * Hence it is immaterial that the issue sought to be litigated in the District Court was not presented to the Tax Court, or could not have been presented because based on subsequent events.

Again, in *Ross v. United States*, 75 F. Supp. 725 (C. Cls.), certiorari denied, 334 U.S. 832, the taxpayer had taken certain deductions for 1935, 1936, and 1937 which the Commissioner disallowed. The taxpayer petitioned the Tax Court which upheld the Commissioner. Subsequently Con-

gress passed a retroactive Act which permitted the deductions the taxpayer had unsuccessfully tried to take. The taxpayer sued for refund in the Court of Claims which held that, even though the statute retroactively allowed the deductions taken by the taxpayer, refund and suit were barred by Section 322(c) merely because the taxpayer had already petitioned the Tax Court for redetermination of the taxes due in the years involved.

In the cases at bar then, taxpayers are precluded merely because they (or their decedents or transferors) have already petitioned the Tax Court; and it makes no difference whether their present claim was presented to or allowed by the Tax Court in those proceedings. Nor do taxpayers qualify under exception two to Section 322(c), for there was no amount collected in excess of an amount computed in accordance with the decisions of the Tax Court which have become final.

II

IN THE ALTERNATIVE, THESE SUITS ARE BARRED BY THE DOCTRINE OF *RES JUDICATA*

The bar to these actions created by Section 322(c) rests solely on the language of the statute and not on general principles of *res judicata*. *Merrill v. United States*, 152 F. 2d 74 (C.A. 2d). In the event, however, that this Court should disagree with the Government as to the effect of Section 322(c) on these actions, we submit that they are also barred

by the doctrine of *res judicata*.⁴ The Supreme Court has discussed this doctrine with respect to tax cases in *Commissioner v. Sunnen*, 333 U.S. 591, 597-598, as follows:

The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose." *Cromwell v. County of Sac*, 94 U.S. 351, 352. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. * * *

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*

Income taxes are levied on an annual basis. Each year is the origin of a new liability and of a separate cause of action. Thus if a claim of liability or non-liability relating to a particular tax year is litigated, a judgment on the merits is *res judicata* as to any subsequent proceeding

⁴/The fact that the prior suits were nominally against the Commissioner, and the present actions against the United States, does not vitiate the application of the doctrine. *Continental Petroleum Co. v. United States*, 87 F. 2d, 91 (C.A. 10th), certiorari denied, 300 U.S. 679; *Greenbaum v. United States*, 17 F. Supp 83 (C. Cls.); 10A Mertens, Law of Federal Income Taxation, Section 60.21.

involving the same claim and the same tax year. But if the later proceeding is concerned with a similar or unlike claim relating to a different tax year, the prior judgment acts as a collateral estoppel only as to those matters in the second proceedings which were actually presented and determined in the first suit.

Taxpayers in the cases at bar are seeking to litigate their tax liability for the same year which they have previously litigated in proceedings before the Tax Court. *Schnitzer v. Commissioner*, 13 T.C. 43 affirmed *per curiam*, 183 F. 2d 70 (C.A. 9th), certiorari denied, 340 U.S. 911. But income tax liability for any one year is a single cause of action. *Commissioner v. Sunnen*, *supra*; *United States v. C. C. Clark, Inc.*, 159 F. 2d 489 (C.A. 5th), certiorari denied, 331 U.S. 818. There is no reason why taxpayers could not have raised the present issue in the prior proceedings before the Tax Court as an alternative argument to the effect that if the transfers of merchandise to Oregon Electric were held to be contributions to capital and not sales, then the taxes paid on the profit if any from those "sales" were erroneously paid. A correct tax deficiency or overpayment for the entire year could have been determined by the Tax Court, as it had jurisdiction to do. *United States ex rel Girard Co. v. Helvering*, 301 U.S. 540, 542. Taxpayers not having submitted to the Tax Court a claim which they might have, the decisions of that court became *res judicata*. *American Woolen Co. v. United States*, 18 F. Supp. 783, new trial denied, 21 F. Supp.

125, affirmed on rehearing, 21 F. Supp. 1021 (C. Cls.), certiorari denied, 304 U.S. 581.

Martin v. Brodrick, 177 F. 2d 886 (C.A. 10th), and *Magruder v. Safe Deposit & Trust Co.*, 159 F. 2d 913 (C.A. 4th), relied on by taxpayers below are not in point. Those cases involved attorneys' fees and expenses arising out of the litigation. Further, the courts are not in accord, even where such fees and expenses are involved in a second suit. *Cleveland v. Higgins*, 148 F. 2d 722 (C.A. 2d), certiorari denied, 326 U.S. 722; *Van Dyke v. Kuhl*, 171 F. 2d 187 (C.A. 7th).

III

IF TAXPAYERS ARE ENTITLED TO ANY RECOVERY, IT MUST BE COMPUTED BY DEDUCTING THE COST OF MERCHANDISE "SOLD" TO OREGON ELECTRIC FROM THE TOTAL COST OF GOODS SOLD BY ALASKA JUNK AS WELL AS BY DEDUCTING THE "GROSS SALES" PRICE OF MERCHANDISE TRANSFERRED TO OREGON ELECTRIC FROM THE TOTAL GROSS SALES OF ALASKA JUNK.

Taxpayers contend, and the District Court held, that they were entitled to reduce the gross sales shown on the partnership return by the sum of \$347,341.62 which they assert was the total sales price of goods furnished by the partnership to Oregon Electric. Taxpayers also contend, and

the District Court held, that no corresponding adjustment should be made in the costs of goods "sold" to Oregon Electric. This, we submit, was error for any one of several reasons.

The finding of the Tax Court discussed under Point I, *supra*, that from October, 1941, the merchandise was furnished Oregon at cost, we submit is *res judicata* and determines for the purpose of these cases that no adjustment of the profit shown on the partnership return can be made.

In any event, it is a mere matter of mathematics that in determining the amount, if any, by which the partnership overstated its *net income* in its return it is necessary to take into consideration the costs of goods sold. This can be done (1) by taking the costs of the goods eliminated from gross sales from the actual sales price of the sales so eliminated, or (2) by deducting the full sales price from the total gross sales, and at the same time deducting from the total cost of goods sold the cost of the goods which have been eliminated from the total gross sales. A deduction of the total sales price alone would effect a reduction of the net income by that amount, and would in effect give to the taxpayers a loss of the costs of the merchandise. It is thus clear that in order to determine the partnership's net income the costs of such merchandise must be eliminated from the partnership's total costs of merchandise at the same time that the total "sales price" of the merchandise is eliminated from its total sales.

In fact, in their brief below taxpayers seem to so admit. Their contention was that income that is taxable is the net income determined from the operations for the entire year; that it was at the end of the year that economic gain or loss was to be determined based upon a computation of the entire year's experience; that to determine taxable income, all of the money expended for the purchases of merchandise during the year, and not only a portion thereof, must be deducted from gross sales; that the merchandise which the partnership delivered to Oregon Electric turned out to be worthless just like merchandise destroyed by deterioration. The argument, of course, is fallacious. The Tax Court and this Court have held that the merchandise was contributed to Oregon Electric by the individual partners. Certainly this is *res judicata*.

Further, taxpayers' position here, though stated in a different way, is the same as it was in the former actions—that the merchandise furnished to Oregon Electric turned out to be worthless. They make no attempt to show that any of the merchandise was destroyed, stolen, etc. But in any event, any loss which resulted from the contributions to Oregon Electric were not losses to the partnership, but were capital losses to the individuals (as stockholders of Oregon Electric (Tax Court R. 41)), limited by Section 117(d), of the Internal Revenue Code of 1939. That section allows losses to taxpayers, other than a corporation, from the sale or exchange of capital assets only to the extent of the gain from such sales or exchanges plus the net income of the tax-

payer or \$1,000, whichever is smaller. No such loss is claimed here, and in so far as the record shows, the loss already has been taken.

CONCLUSION

The judgments of the District Court should be reversed, and no refunds whatsoever allowed to these taxpayers. But if the Court should hold that some refunds should be made, they should be figured in accordance with the method submitted by the Government in Point III of the Argument.

Respectfully submitted,

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JUNE, 1956.



United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,
v.

MONTE L. WOLF, Executor of the Estate of Harry J. Wolf, deceased,
Appellee.

UNITED STATES OF AMERICA, Appellant,
v.

MONTE L. WOLF, Transferee of the Estate of Jennie Wolf, deceased,
Appellee.

UNITED STATES OF AMERICA, Appellant,
v.

BLOSSOM M. GRAYSON, Transferee of the Estate of Jennie Wolf, deceased,
Appellee.

UNITED STATES OF AMERICA, Appellant,
v.

CHARLOTTE C. COHON, Transferee of the Estate of Jennie Wolf, deceased,
Appellee.

UNITED STATES OF AMERICA, Appellant,
v.

MANUEL SCHNITZER, HAROLD SCHNITZER and LEONARD
SCHNITZER, Executors of the Estate of Sam Schnitzer, deceased,
Appellees.

On Appeal from the Judgments of the United States District Court
for the District of Oregon.

BRIEF OF APPELLEES

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Nos. 15,011 to 15,015

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On Appeal from the Judgments of the United States District Court
for the District of Oregon.

BRIEF OF APPELLEES

STATEMENT

References to the Transcript of Record will, in all cases, refer to the Transcript in Docket No.

15011. The Transcripts of Record in the other cases are, in all respects, material to this appeal, the same as in Docket No. 15011.

The actions were brought to recover refund of taxes erroneously collected (admitted) from the taxpayers.

The five cases were consolidated for the purpose of trial in the Court below because the questions involved are the same.

The cases were tried and submitted to the Court below upon an agreed statement of facts set forth in the Pre-trial Order entered in each case and the exhibits referred to therein under the heading of "Agreed Facts" (Tr. of Rec. 41 to 53). The Pre-trial Orders are, in all of the cases, the same with respect to all of the facts relevant to these appeals.

The stipulated facts, admit that Appellees overpaid the taxes for the year in question (Tr. of Rec. 48 to 52); that the plaintiffs are entitled to judgments for the amounts set forth in the Pre-trial Order unless recovery is barred by **Section 322(c) of the Internal Revenue Code** or by the principles of res judicata and collateral estoppel (Tr. of Rec. 51).

It is also stipulated that the overpayments for which the plaintiffs are entitled to a judgment, unless barred as aforesaid, are as follows:

Action Number	As Per Plaintiffs' Computation	As Per Defendant's Computation
7097	\$41,608.89	\$24,955.82
7098	13,025.09	8,162.57
7099	13,025.09	8,162.57
7100	13,025.09	8,162.57
7102	41,719.77	25,143.06

with interest as required by law (Tr. of Rec. 51).

Judgments were rendered in the Court below for the plaintiffs-appellees in accordance with plaintiffs' computation.

The pertinent facts, so far as material to the questions presented on these appeals as they are set forth in the Agreed Facts in the Pre-trial Order, are as follows:

In 1943, the tax year in question, and for many years prior thereto, Alaska Junk Co. was a partnership composed of four partners. They were:

Sam Schnitzer,	Rose Schnitzer,
Harry J. Wolf,	Jennie Wolf.

Each had a one-fourth interest in the partnership.

In 1941 the partners, and another, named Morris Schnitzer, who had no interest in the partnership, organized a corporation to construct a steel mill and engage in the manufacture and sale of steel. Each of the partners subscribed for capital stock of the corporation.

The partnership advanced monies and sold merchandise to the corporation during the period of

time that the mill was under construction in the tax year in question.

The **cash** advances made by the partnership to the corporation were carried on the books of the partnership as loans to the corporation.

The **merchandise** supplied by the partnership to the corporation was treated by the partnership as "sales" to the corporation and were carried on the books of the partnership as "accounts receivable."

The partnership kept its books and made its income tax returns on the calendar year **accrual** basis. Accordingly, the partnership **included the "sales" to the corporation in the "gross income"** in the tax year in question **in making the partnership income tax information return** and were included in the distributive share of each of the four partners in determining each partner's share of the partnership net income. **Each of the partners paid income taxes thereon.**

In November 1943, the partners were forced to abandon the venture and dispose of their stock interests in the corporation. The obligations from the corporation to the partnership for the advances and the sales of merchandise became worthless in 1943.

In making the income tax returns for the year 1943, the partners took, as a deduction, the losses sustained by the partners **by reason of the worthlessness of the obligations** from the corporation to

the partnership, **including the loss from the sale of merchandise as aforesaid.**

The Commissioner of Internal Revenue disallowed the loss deductions on the ground that the loans made and the merchandise sold to the corporation **constituted capital contributions** to the corporation and were not "sales" deductible as bad debt losses. He, accordingly, determined a deficiency for the tax year 1943 based upon the disallowance of the deductions.

In determining the deficiency, as aforesaid, **the Commissioner did not reduce the "gross income" so as to eliminate therefrom the "sales"** which he determined to be capital contributions.

All of the partners involved in these cases filed petitions with the Tax Court of the United States to review the said determination of the Commissioner. The Tax Court sustained the Commissioner's determination insofar as it disallowed the bad debt loss deductions. On appeal this Court affirmed the decision of the Tax Court and certiorari was denied by the Supreme Court.

Thereafter, the deficiencies were assessed against and were collected from all of the taxpayers and all of the taxpayers paid the deficiencies.

The result of the determinations and the payment of the deficiencies, was, that in each case, **the amount of taxes paid on the return as filed, plus the deficiency determined as aforesaid, exceeded,**

in each case, the total tax liability of each taxpayer for the year in question to the extent shown above. This is conceded by the stipulated facts (Tr. of Rec. 48-52). This concession was made because it was recognized by defendant that since it was determined that the merchandise delivered by the partnership to the corporation did not constitute sales, the partnership erroneously included the sales in the reported gross income and the partners erroneously paid income tax thereon.

Plaintiffs then filed claims for refund of the taxes erroneously collected. The claims were rejected and these actions were brought to recover refund of the excess taxes.

The defendant contended that the plaintiffs are barred from recovering the admitted overpayments by reason of the prosecution of the proceedings in The Tax Court of the United States and in the alternative, if they are not barred by Section 322(c) of the Revenue Code, they are barred by the principles of res judicata or collateral estoppel by judgment, both being based on the judgments rendered by the Tax Court.

The Court below held that plaintiffs were not barred by **Section 322(c) of the Internal Revenue Code** from suing to recover the refund of the overpayments; that they came within the purview of Exception No. 2 to Section 322(c); that they were not barred by the principles of res judicata and collateral estoppel and rendered judgments in favor of the plaintiffs-appellees.

A question was presented as to the proper basis for computing the amount of the refund in each case. Appellees contended, and made their computations, by deducting from the "gross income" shown in the original returns, the amount of the "sales" determined to be capital contributions.

Defendant-appellant contended, and made computation, by deducting, on the one hand, the "sales" from the gross income and, on the other hand, the cost of the "sales" (the goods delivered to Oregon Steel), from the total cost of "sales" shown in the return.

The Court below adopted the computations made in accordance with plaintiff's contention on the theory that it was not proper to deduct the cost of "sales" in arriving at the net income for the year in question.

The pertinent "Agreed Facts" recited (Tr. of Rec. 48):

"As a result of said adjudication, it follows that the 'sales' to Oregon Electric Steel Rolling Mills were **erroneously** carried on the books of the Alaska Junk Company as accounts receivable; they were **erroneously included in the gross income** of the partnership for 1942 and 1943; the **income and victory taxes** paid by the partners on their distributive shares therefrom under the original returns, **were erroneously paid**; and the amounts of such 'sales' **should have been excluded from the gross income of Alaska Junk Company**, thus reducing the amount of the net income reportable by (each partner) on his individual income and victory tax return for the taxable year 1943.

(Tr. of Rec. 51):

"The parties stipulate that the above computations are true and correct and that in the event the Court shall determine that the prosecution of this action is not barred by Section 322(c) of the Internal Revenue Code of 1939, or by the principle of *res adjudicata*, and/or the doctrine of collateral estoppel, the judgment to be entered in favor of the plaintiff, shall be in accordance with and for the amount of overpayment shown in whichever of the above computations is determined by the Court to be applicable under the circumstances, to-wit:"

Following this paragraph, in each case, is the amount to be allowed in accordance with the computation of the plaintiffs or the defendant whichever was to be adopted by the Court.

I

THE ACTIONS ARE NOT BARRED BY SECTION 322(c), INTERNAL REVENUE CODE OF 1939. THE CASES COME WITHIN THE EXCEPTION NO 2 TO SECTION 322(c).

Section 322 of the Internal Revenue Code is a comprehensive statute dealing with many phases of claims for refunds of taxes illegally collected.

Subsection (a)(1) provides:

"(a) Authorization

"(1) Overpayment. Where there has been an overpayment of any tax imposed by this

chapter, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer."

Subsection (b)(1) is a statute of limitations applicable to claims for refund.

Subsection (b)(2) deals with limits on the amount of credit or refund.

Subsection (b)(3) deals with exceptions in the case of waivers.

Subsection (c) provides:

"(c) Effect of petition to Board. If the Commissioner has mailed to the taxpayer a notice of deficiency under section 272(a) and if the taxpayer files a petition with the Board of Tax Appeals within the time prescribed in such subsection, no credit or refund in respect of the tax for the taxable year in respect of which the Commissioner has determined the deficiency shall be allowed or made and no suit by the taxpayer for the recovery of any part of such tax shall be instituted in any court except—

"(1) As to overpayments determined by a decision of the Board which has become final; and

"(2) As to any amount **collected in excess** of an amount computed in accordance with the decision of the Board **which has become final**;

"(3) As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit

or refund or in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive."

Subsection (d) provides:

"(a) Overpayment found by Board. If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect to the taxable year in respect of which the Commissioner determined the deficiency, or finds that there is a deficiency but that the taxpayer has made an overpayment of tax in respect of such taxable year, the **Board shall have jurisdiction to determine the amount of such overpayment,** and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer. No such credit or refund shall be made of any portion of the tax **unless the Board determines as part of its decision (1) that such portion was paid**"

The Commissioner of Internal Revenue made a determination that the "sales" made to Oregon Steel were not "sales," but were "capital contributions" and upon that theory, disallowed the loss deductions taken by the plaintiffs resulting from the worthlessness of the account receivable.

Appellees filed petitions with the Tax Court for review of the Commissioner's determination. In such proceeding, plaintiffs contended that the sales, carried on partnership's books as "sales" and as "accounts receivable," were "sales," in law and in fact, and that they were entitled to the deductions when the accounts receivable became worthless.

The only issue (aside from the issue of partnership not now material) in that proceeding, was whether the transactions referred to were "sales" or "capital contributions."

The Tax Court affirmed the determination of the Commissioner. The decision of the Tax Court was affirmed by this Court and certiorari was denied by the Supreme Court. That determination resulted in the assessment of deficiencies against the plaintiffs by reason of the disallowance of the loss deductions.

When the decision of the Tax Court became final, the deficiencies were collected. The agreed facts establish that the taxes, originally paid when the returns were filled, plus the amounts collected in accordance with the determination of the deficiencies, resulted in an overpayment of the tax liability of each of the plaintiffs for the year in question.

The transactions between the partnership and Oregon Steel involved in the Tax Court proceeding, could not, of course, be at the same time "capital contributions" and "sales."

The final judgment of the Tax Court, affirmed on appeal, established that the "sales" on which taxes were paid, were erroneously included in the gross income for the year in question and it follows that the taxes paid thereon were erroneously collected.

As long as the taxpayers believed and contended that the deliveries of merchandise constituted "sales," they could not of course, and did not, in those proceedings, claim any refund of the taxes paid on those sales as a part of the gross income of the partnership.

The right to claim a refund of the taxes paid on those sales as a part of the gross income of the partnership, arose for the first time **after** the Tax Court affirmed the determination of the Commission **and the taxpayers paid, and the Collector collected from the taxpayers, the deficiencies** resulting from the determination that the merchandise constituted capital contribution. It was the invitum reversal of the transaction by the judgment of The Tax Court from "sales" to "capital contributions" and the assessment of the deficiencies resulting therefrom **and the collection** of these deficiencies **after** The Tax Court's final determination, that **gave rise for the first time** to the right of a refund of the income taxes paid on the sales.

The "excess" collection **came into being and accrued** only when the deficiency was paid **after** the decision "which has become final." It was the collection of the "deficiency" plus the amount originally paid, that resulted in the "excess" collection. **There were no overpayments at any time until after the Tax Court determination became final and the deficiencies were paid.**

These cases come within the purview of Exception Number 2 to Section 322(c) of the Internal Revenue Code which preserved to the taxpayer the right to seek refund of taxes **“collected in excess of an amount computed in accordance with the decision of the Board which has become final.”**

This exception relates to amounts “collected” after the determination of The Tax Court, when the **collection results in creating an “excess”** of the amount of tax liability legally due. In other words, if The Tax Court makes a final determination requiring a computation which produces an excess of tax liability and that excess is collected **after** the judgment has become final, the exception Number 2 preserves the right to recover that excess.

Prior to the judgment of The Tax Court, and the collection of the deficiency, there was no payment in excess of the legal tax liability for the tax year. Prior to the decision, only a portion of the true tax liability as determined had been paid, to-wit, the payment made when the original return was filed in which the bad debt deduction was taken. The balance of the tax for that year was paid after The Tax Court’s decision became final. It is only by adding the tax payments originally made to the tax paid on the determination of the deficiencies, that the **admitted “excess”** was “collected” and this, of course, was after the decision of The Tax Court became final.

The taxpayers could not have asserted any

claim of "overpayment" or for refund in The Tax Court because that claim did not accrue until the payment was made pursuant to the judgment determining the deficiency which was after The Tax Court's decision became final. There was no "overpayment" at any time while the case was pending in The Tax Court.

In *United States v. Jaffray*, 97 F. 2d 488, (8th Cir.), the Court held:

"The cause of action accrued at the time the **overpayment** was made to the Collector. *Guetel v. United States*, 8 Cir., 95 F. 2d 229."

The Taxpayers could not have asserted any claim for refund in The Tax Court because that Court had **no jurisdiction** to determine or order a refund of taxes unlawfully collected.

The jurisdiction of The Tax Court is limited.

Section 322(d) of the Internal Revenue Code provides:

"(d) Overpayment Found by Board.—If the Board finds that there is no deficiency and further finds that the taxpayer has made an overpayment of tax in respect of the taxable year in respect of which the Commissioner determined the deficiency, the Board shall have **jurisdiction to determine**, the amount of such **overpayment**, and such amount shall, when the decision of the Board has become final, be credited or refunded to the taxpayer."

The statute is implemented by the REGULATIONS 111, Section 29.322-7 as follows:

"(1) If the Tax Court finds that there is **no deficiency** but that the person has **overpaid**

his tax for the year to which the notice of deficiency relates, and the decision of The Tax Court as to the amount overpaid has become final (see section 1140, set forth in paragraph 39 of the Appendix to these regulations), the **overpayment** shall be credited or refunded, but no such credit or refund shall be made of any portion of the tax **unless The Tax Court determines** as part of its decision—

(i) that such portion **was paid—**”

It is obvious that the jurisdiction of The Tax Court is limited to determination of an “overpayment” that **has already been made and paid**. The Tax Court is required to make a finding that an overpayment has been made.

The Tax Court had no **jurisdiction** to determine **prospectively** that an overpayment **will result** as and when a deficiency determined by it will be collected from the taxpayer.

There is nothing in the provisions of Section 322(c) to indicate that it was the intention of Congress to penalize a taxpayer who was compelled to pay a deficiency determined by the judgment of The Tax Court when the amount so collected added to the amount paid upon the filing of the return results in an overpayment (excess) of the tax liability.

The **cause of action was created by the decision of The Tax Court** which reversed the transaction and determined that the “sales” were not “sales” and the cause of action accrued when the deficiency was collected “after the decision became final.”

Subdivision (c) of Section 322 is in the nature of a statutory application of the rules of res judicata to Tax Court proceedings. It was obviously designed that all issues that could arise **under the conditions existing at the time the proceeding is pending** with respect to a particular tax year, should be raised and determined in the one proceeding.

It is also obvious, however, that the framers of **subsection (c)** were aware that injustices could arise from an arbitrary bar which would preclude all relief with respect to the problem involving a particular tax year, which would be inconsistent with the remedial character of the legislation embodied in **Section 322(a)**. The Congress, in that subdivision of the Act, obviously intended to insure that taxes in excess of the correct tax liability, should not be collected and if collected, should be refunded "immediately."

The Congress was undoubtedly also aware that an **excess collection** could be made under varying circumstances **after the decision of The Tax Court has become final**.

The Congress, therefore, attached three specific exceptions to the bar created by **subdivision (c)**, all of which preserves a right to seek refund after the decision of The Tax Court has become final, which precludes a construction of **subdivision (c)** that would bar absolutely and under all conditions the right to seek a refund after the decision of The

Tax Court has become final when the claim for refund involves the same tax year.

Exception No. 2 deals specifically with a situation such as exists in the case at bar. Indeed, if it does not govern the case at bar, it can serve no conceivable purpose and it would be a nullity.

Exception No. 2 should be construed as did the Court in the case of **Schmitt v. Kavanagh**, 91 F. Supp. 659. The Court held:

“In attempting to construe the applicable statutes, it may be helpful to keep in mind that the **defendant admits that there has been an overpayment** but asserts that the plaintiff has no remedy, notwithstanding the obvious attempt of Congress to make provision for refunds to taxpayers who have overpaid their taxes. **Such an interpretation of the Code ought to be avoided unless it is clear that Congress intended to exclude such relief.**” (Emphasis supplied.)

In **Bull v. United States**, 295 U.S. 247, 55 S. Ct. 695, the Commissioner of Internal Revenue treated a fund both corpus of the decedent's estate for the purpose of fixing the estate tax and also as income to the executor subject to income tax, thus imposing double taxation. The Court held that this was inconsistent and in discussing the relief to be afforded to the taxpayer, the Supreme Court of the United States recognized the purpose of the remedial legislation embodied in what is now the whole of Section 322 of the Internal Revenue Code. The Court said:

“In recognition of the fact that erroneous determinations and assessments will inevitably occur, the statutes, in a spirit of fairness, invariably afford the taxpayer an opportunity at some stage to have mistakes rectified

.

The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of their agent. *United States v. State Bank*, 96 U.S. 30, 24 L. Ed. 647. While here the money was taken through mistake without any element of fraud, **the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights.**” (Emphasis supplied.)

The situation is, of course, the same in principle in the case at bar for here, too, the transactions under consideration could not be sales subject to income tax and capital contributions, which would deprive the taxpayer of the right to a loss deduction upon the failure to receive payment. The plaintiffs have been concededly subjected to double taxation: first, by payment of income tax on the sales and, second, by an increase of the amount of its tax through the denial of the loss deduction, and the principles recognized by the Supreme Court in the *Bull* case are applicable to the case at bar.

Appellant's argument in the brief, in effect, ignores the exceptions to **subdivision (c)**, and particularly exception No. 2 thereof. It ignores the remedial character of **Section 322(a)** and the obvious scheme of the entire **Section 322** with all its exceptions to preserve under varying conditions the

right to recover refund of taxes illegally collected even though the tax liability for a given year was involved in The Tax Court proceeding and especially so where the excess tax collected was the direct result of the decision which has become final and payment of the excess was exacted and collected after the decision has become final.

The theory that the tax year is a unit under **Section 322(c)** is modified by the exceptions included therein. The adoption of the theory of the appellant that the tax year is a unit for all purposes and that the bare prosecution of a proceeding in The Tax Court involving a given tax year, is an absolute bar under all conditions, would render the exceptions nugatory.

In the case at bar, the claims for refund were not and could not be presented or litigated or determined in the Tax Court proceeding. There was no overpayment or excess tax collection in existence at any time while the Tax Court proceeding was pending.

While the Tax Court had jurisdiction to determine the existence of an overpayment, it could not do so in the case at bar because there was no overpayment in fact at that time. The collection of the excess was made after the decision of the Tax Court became final and the amount of the deficiency determined thereby was collected.

In **Commissioner v. Gooch Milling & Elevator Co.**, 320 U.S. 418, 64 S. Ct. 184, the Court held:

“The Board is confined to a determination of the amount of deficiency **or overpayment** for the particular tax year as to which the Commissioner determines a deficiency and as to which the taxpayer seeks a review of the deficiency assessment. Internal Revenue Code, §§ 272, 322(d), 26 U.S.C.A. Int. Rev. Code, §§ 272, 322(d). **It has no power to order a refund or credit** should it find that there has been an overpayment in the year in question. *United States ex rel Girard Trust Co. v. Helvering*, 301 U.S. 540, 54, 57 S. Ct. 855, 856, 81 L. Ed. 1272.”

The use of the word “collected” in Exception No. 2 to Section 322(c) is highly significant. The Exception preserves the right to recover a refund which was “collected” and not a refund of an amount “determined.”

The **computation** to be made, that is **referred to in the exception**, is one that must be made **after the “decision” “which has become final.”** It does not refer to the computation under Rule 50 which is made **before the decision becomes final.** It refers to the computation that gives effect to the decision upon which the collections were made **and the amounts thus collected.**

In *Moir v. United States*, 149 F. 2d 455 (First Circuit), the Court quoted and reviewed legislative history of **Section 322(c)**, and the exceptions, and italicized the portion of the Senate Report reading as follows:

“**‘It is the purpose of the bill that all questions arising prior to the time the decision of**

the Board has been rendered as to the right of the Commissioner to assess and collect the tax, including the question as to whether or not the statute of limitations has run before the mailing of the deficiency letter, shall be determined by the Board, and by the courts on appeal from the Board.' ”

With respect to the purpose of the Act as set forth in this portion of the Report, the Court said:

“When the committee goes on to say that it is the purpose of the bill ‘that all questions arising prior to the time the decision of the Board has been rendered as to the right of the Commissioner to assess and collect the tax * * * shall be determined by the Board,’ it apparently has reference to the express exceptions in the section, some of which do relate to events taking place after the decision of the Board has been rendered; for instance, where a deficiency found by the Tax Court has been wrongfully collected after the expiration of the statutory period of limitations upon the beginning of distraint, or where the Commissioner has wrongfully collected an amount in excess of that computed in accordance with the decision of the Tax Court.” (Emphasis supplied.)

This confirms appellees’ contention that **Section 322(c)**, with its exceptions, creates a bar only as to “all questions arising prior to the time the decision of the Board has been rendered,” and that the statute does not operate to bar a cause of action which accrues subsequent to the time the decision of the Tax Court becomes final by the collection of an excess tax.

Re Authorities Cited by Appellant.

Numerous cases are cited in support of the proposition that the filing of a petition with the Tax Court forecloses any other proceeding involving the tax year in question. But none of the cases involve the **application of the exceptions** embodied in the statute.

The **second** exception reserves the right to sue for refund of any amount "collected" in "excess" of an amount computed in accordance with the decision of the Tax Court "which has become final." It relates to an amount **collected after** the judgment has become final if it is in excess of an amount determined "in accordance with the decision of the Board."

The **third** exception relates to an amount collected **after** the Board's determination of a deficiency has become final and collection of the tax so determined is made after the expiration of the period of limitation for distraint.

The **first** exception deals with collections made prior to the final judgment and the **second** and **third** exceptions deal with collections made **after** final judgment.

It is admitted that the amount collected after the judgment became final in this case, when computed in accordance with the "decision," is in excess of the lawful tax liability. The decision and the collection produced this result. The collection of the excess accrued the liability.

The three exceptions to the bar, when read in the light of the whole of Section 322 of the Internal Revenue Act, are, in legal effect, a modification of or limitation upon the bar created by the doctrine of *res judicata* generally and as it is incorporated in the forepart of subdivision (c) to avoid the injustice and hardship of unlawful tax collection.

The case of **Bankers' Reserve Life Co. v. United States** 44 F. 2d 1000, cited by appellant, is not relevant. The taxes involved in that case were paid **before** the institution of the Tax Court proceeding. They were paid at the time the income tax returns were filed. The Court held that these alleged overpayments could have been asserted in the Tax Court proceeding because the Tax Court had jurisdiction to determine an "overpayment." The case did not involve the application of any of the exceptions to Section 322(c). The case was not determined on the doctrine of *res judicata*.

In stating the substance of what is now Section 322(c), the Court was careful to point out that "exceptions" were "not here present."

The case of **Cook v. United States**, 108 F. 2d 804, is not relevant. It did not involve the application of **exception No. 2 to Section 322(c) of the Internal Revenue Code**. The right to sue for refund was not predicated upon any of the exceptions.

The Court, after quoting **Section 322(c)**, said:

" '(the exceptions are not applicable here).' "

In that case, the Commissioner determined a deficiency. The taxpayer petitioned the Tax Court for review and paid the deficiency determined by the Tax Court. Taxpayer thereafter sued to recover the same amount instead of appealing from the decision. In that case, it was **not admitted that the payment of the deficiency resulted in an overpayment** of the taxes due by the taxpayer for the year in question.

In the case at bar, **it is admitted that the payment resulting from the disallowance of the loss deduction, plus the payment originally paid, results in an overpayment** of the taxes and this is due to the fact that the taxpayer treated the merchandise delivered to Oregon Steel as "Sales" and paid taxes thereon. It was the subsequent determination that these were not sales that gives rise to this claim for refund of the taxes paid thereon.

The case of **Fiorentino v. United States, 226 F. 2d 619**, cited by appellant, is not relevant. In that case, too, the Court, after quoting **Section 322(c)**, said:

“ ‘Then follows certain exceptions not relevant here.’ ”

The action for refund was not predicated on the application of any of the exceptions. It was predicated on the contention that the Tax Court had dismissed the petition for review for want of prosecution; that such dismissal did not constitute a determination, and that by reason thereof, the Tax

Court had no jurisdiction. This was the only question involved and is foreign to the case at bar.

The case of **Staten Island Shipbuilding Co. v. United States**, 31 F. Supp. 166, cited by appellant, is not relevant. In that case, the overpayment, which was the subject of the action for refund, was made **prior** to the commencement of the Tax Court proceeding and the Court held that the taxpayer

“had the right to show that it had overpaid its taxes”

in the Tax Court proceeding. The statute expressly confers jurisdiction upon the Tax Court to determine an overpayment which had actually been made. Moreover, the parties entered into a stipulation in the Tax Court upon which the final determination was made, determining the controversies involved, both as to the deficiency determined by the Commissioner and as to overpayment, and upon that stipulation, the Tax Court entered an order that there was “no deficiency” and “no overpayment due the taxpayer.”

In the case at bar, there was no overpayment when the Tax Court proceedings were initiated or while they were pending, and there was no stipulation and judgment determining that there was no overpayment. The overpayment came into being for the first time after the decision of the Tax Court became final and payment was made of the additional taxes.

The case of **Bear Mill Mfg. Co., Inc. v. United States**, 93 F. Supp. 988, is not relevant. In that case, the claim for refund involved monies that were paid **prior** to the determination of a deficiency by the Commissioner. In fact, the deficiency was determined after the claim for refund was filed with the Commissioner and the Commissioner informed the taxpayer, in the 90 day deficiency letter that

“the issue set forth in his claim for a refund should be made a part of the petition to be considered by the Tax Court in any redetermination of its tax liability.”

The overpayment having been made prior to the commencement of the Tax Court proceeding, the Tax Court had jurisdiction to determine the issue of overpayment. Not so, in the case at bar, because there was no overpayment at any time during the pendency of the Tax Court proceeding.

The case of **Lehigh Valley Trust Co. v. United States**, 34 F. Supp. 839, cited by appellant, is not relevant. In that case, the Commissioner determined a deficiency at a time when the collection of additional tax was barred by the statute of limitations. Taxpayer petitioned for review, but did not, in the Tax Court proceeding, set up the statute of limitations as a bar. In that proceeding, a stipulation was entered into which fixed the partnership's tax liability and a final judgment, determining a deficiency in that amount, was entered. The taxpayer did not make any contention in the Tax Court that the claim for deficiency was barred.

The taxpayer paid the deficiency and asked for refund, claiming that the collection was barred. It predicated its right to prosecute the action for refund on the third exception to Section 322(c).

The third exception is as follows:

“ ‘As to any amount collected after the statutory period of limitations upon the beginning of distraint or a proceeding in court for collection has expired; but in any such claim for credit or refund or in **any such suit for refund** the **decision** of the **Board** which **has become final**, as to whether such **period has expired** before the **notice of deficiency** was mailed, shall be **conclusive.**’ ”

The Court merely held that the taxpayer was bound to raise the defense of statute of limitations in the Tax Court proceeding and the decision of the Tax Court on the issue of the statute of limitations would be conclusive in any claim for refund. But not having raised the issue in the Tax Court, the judgment of the Tax Court precluded raising the issue by a subsequent action for refund. In arriving at its decision, the Court gave consideration to the Conference Report when read in connection with the Report of the Senate Committee on Finance. That Report said in part:

“If the Board decided that the statute had run against a collection and the Commissioner proceeded to collect in spite of that decision, a suit could be maintained to recover the payment.”

The Committee apparently intended that there would be a surviving right to prosecute an action

for refund under conditions similar to those in the case at bar for here, too, the final decision of the Tax Court resulted in the collection of taxes admitted to be in excess of the tax liability notwithstanding its determination that the items which the taxpayer treated as "sales" and paid taxes thereon, were not "sales" and consequently not subject to income tax payment.

The case of **Merrill v. United States**, 152 F. 2d 74, cited by appellant, is not relevant.

In that case, the taxpayer brought an action for refund of taxes based upon an Act of Congress allowing certain deductions, which Act became effective after the final determination of the Tax Court in which all questions pertaining to the taxpayer's tax liability were litigated and determined.

The question whether the taxpayer's claim comes within any of the exceptions to **Section 322(c)** was not involved.

Elbert v. Johnson, 69 F. Supp. 59, affirmed, 164 F. 2d 421, cited by appellant, did not involve the application of Exception No. 2, or any of the exceptions, to Section 322(c). The Court of Appeals said (p. 423) that the "**exceptions (were) not presently applicable.**" The Court pointed out:

"It is urged that in addition to the exceptions specified in the statute, the court should read in another, namely, as to an overpayment in a prior year as to which the Tax Court lacks jurisdiction to allow credit against the deficiency for the taxable year in suit."

The case did not involve **excess payments** "collected" after the decision of the Tax Court had become final, but involved payments made **prior** to the Tax Court proceedings which could have been litigated therein and an adjudication of "overpayment" obtained.

Judge Learned, in his concurring opinion in that case, said:

"That decision (*Bull v. United States*, 295 U.S. 247, 55 S. Ct. 695), as I understand it, **permits a taxpayer without penalty to assert his versions of a transaction, until it is finally decided against him.** That is to say, if the transaction is susceptible of two interpretations, and the taxpayer has paid a tax which was required by the interpretation he puts upon it, **he does not forfeit his right to a refund of that tax,** because the statute of limitation has run against him before the courts have finally decided that his interpretation was wrong; the statute is tolled." (Emphasis supplied).

That observation of Judge Hand dissipates the contention made in defendant's brief to the effect that plaintiffs should have anticipated an adverse decision on the question of the **loss deduction** and should have pleaded in accordance with such anticipation in the Tax Court. Under Judge Hand's observation, based upon the **Bull case**, the plaintiffs in this case had a right to stand on the contention that the merchandise delivered to the Corporation were "sales" and not "capital contributions" because they had so treated the transactions in good faith, and paid the income taxes on those sales.

They could maintain that position "without penalty" to their present assertion that they are entitled to a refund of those taxes after the Court determined that they were not sales, but capital contributions.

In this case, we do not seek to "**re-litigate**" any issue that was tried and decided in the Tax Court. On the contrary, this case is based upon the determination of the issues made by the Tax Court. That Court determined that the transactions, which the plaintiffs treated as sales and upon which they paid income taxes, were not sales at all; that they were capital contributions and for that reason, refused to allow the deduction of the losses sustained in those transactions. In the case at bar, **plaintiffs accept that determination**. It was that determination and the additional taxes "collected" by reason thereof that created the "excess" collected by the defendant.

The case of **Ross v. United States, 75 F. Supp. 725**, is irrelevant for the same reasons that are applicable to the **Merrill Case**, supra. It involved the identical question, to-wit, whether **Section 322(c)** was impliedly repealed by the 1942 Act which made provision for certain deductions.

II

RECOVERY IS NOT BARRED BY THE DOCTRINE OF RES JUDICATA OR COL- LATERAL ESTOPPEL.

Defendant makes the alternative contention that **if plaintiffs are not barred** by Section 322(c) of the Internal Revenue Code, that they are barred by the application of the doctrine of res judicata or collateral estoppel.

It is not claimed, and cannot be, that the right to a refund was litigated and determined in the Tax Court proceedings.

It is only contended that the claim **could have been** presented in the Tax Court proceedings under Rule 50 of that Court.

A

Res Judicata and Collateral Estoppel Are Not Applicable to Cases that Come With- in the Exceptions to Section 322(c).

If the Court determines that the actions were not barred by the provisions of **Section 322(c)** and the exceptions thereto, then the doctrine of res judicata and collateral estoppel cannot have any application to the case at bar because the doctrines, if applied, would be contrary to the provisions in the exceptions which were designed to preserve the

cause of action for refund notwithstanding the rendition of a final judgment in the Tax Court proceeding.

To apply the doctrines of *res judicata* and collateral estoppel, when the exceptions are applicable, would, in effect, be a judicial repeal of the exceptions to 322(c).

In **Crown Willamette Paper Co. v. McLaughlin**, 81 F. 2d 365, (Ninth Cir.) taxpayer sued for refund of taxes alleged to have been collected after collection was barred by the statute of limitations. Taxpayer had contested the validity of the assessments in the Tax Court and the determination of the Commissioner was affirmed. Actions for refund were brought after the final decision of the Tax Court. The Commissioner contended, as in the case at bar, that the decision of the Tax Court were *res judicata*. This Court held:

“Appellee contends that they are *res judicata*, and that appellant and the courts are concluded thereby. This contention cannot prevail. It is based on section 322(c) of the Revenue Act of 1932, c. 209, 47 Stat. 242, 26 U.S.C.A. § 3322 (c), see 26 U.S.C.A. § 322 (c), which provides that, with certain exceptions, no suit shall be instituted by any taxpayer for the recovery of any tax in respect of which a petition for redetermination has been filed with the Board of Tax Appeals. One of the exceptions specified in section 322(c) is: ‘As to any amount collected after the period of limitation upon the beginning of distraint or a proceeding in court for collection has expired.’ This suit comes within that exception and is maintainable, not-

withstanding the proceedings before the Board of Tax Appeals.

“In making this exception, section 322 (c) provides that ‘in any such suit for refund the decision of the Board which has become final, as to whether such period has expired before the notice of deficiency was mailed, shall be conclusive.’ **This provision is inapplicable here, because, in this case, no such question was presented to or decided by the board.**”

Under this decision, the doctrine of res judicata is inapplicable in a case that comes within any of the exceptions to **Section 322(c)**. In that case, the third exception was involved. In the case at bar, the second exception is involved. But the principle is the same and it follows, that if this Court affirms the decision of the Court below, that the actions were not barred by **Section 322(c)** and that they come within the second exception, then the question of res judicata and collateral estoppel and the application to the case at bar becomes moot.

In **Merrill v. United States, 152 F. 2d 74**, cited by appellant, the Court of Appeals for the Second Circuit, recognized that the doctrine of res judicata has no application to a case coming within the purview of **Section 322(c)** and the exceptions thereto. In that case, the taxpayer made the same contention that is now made by appellant. The Court held:

“We see no merit in taxpayers’ suggestion that res judicata doctrines must control the effect of the Board’s decision, and that therefore § 322(c) is no bar as to any matter which could not have been raised before the Board.

The issue here concerns a statute of limitations and not *res judicata*."

However, if the Court deems discussion of the doctrines relevant, we submit the following observations in respect thereto:

B

Re: Res Judicata

It is settled beyond question that where the second proceeding is "upon a different cause or demand," the principles of *res judicata* have no application. Only collateral estoppel could become involved.

Commissioner of Internal Revenue v. Sunnen,
333 U.S. 591, 68 S. Ct. 715;

Cromwell v. County of Sac, 94 U.S. 351;

Mercoird Corporation v. Mid-Continent Investment Co., 320 U.S. 661, 64 S. Ct. 268;

Larsen v. Northland Transportation Co., 292 U.S. 20, 54 S. Ct. 584.

In the cases cited above, it is established beyond question that the doctrine of *res judicata* (as distinguished from collateral estoppel) applies only where the parties and the "cause or demand" or the "subject matter" of the two proceedings are the same.

If the "causes of action" or the "subject matter" of both proceedings are not the same, then only the doctrine of collateral estoppel may become involved

with respect to a particular issue common to both proceedings **which has been actually litigated and adjudicated.**

The doctrine of collateral estoppel does not apply to cases in which issues **could and might have been presented and adjudicated, but where not presented or adjudicated,** and that is true whether the presentation of the issue in the earlier proceeding was permissive or compulsory.

In the case at bar, the "cause or demand" or the "subject matter" of the litigation, is not the same as in the prior Tax Court proceeding.

In the Tax Court proceeding, the "cause or demand" or "subject matter" was the allowance of "loss deduction" resulting from the worthlessness of accounts receivable and notes receivable. The case involved the relationship between the taxpayers and the Oregon Steel and whether the items, carried as accounts receivable and notes receivable, were, in fact and in law, "capital contributions."

In the present proceedings, there is no such issue. The action is to recover an **admitted** overpayment of the taxes and is predicated on the adoption of the determination made in the Tax Court as to the relationship of the parties.

It is the decision of the Tax Court and the collection of the excess taxes after the decision became final, that gave rise to the present cause of action.

Section 322(c) is, itself, in the nature of a statutory rule of *res judicata*, which is made subject to three specific exceptions.

In **Murphy v. United States**, 78 F. Supp. 236 (U.S. D.C., S.D., Cal.), the Internal Revenue Agent, after examination of the estate tax return, informed the taxpayer that a deficiency would be determined. The taxpayer paid to the Commissioner the amount indicated by the Revenue Agent. Thereafter, a formal determination of a deficiency was made and a proceeding was brought in the Tax Court to review the determination. In the Tax Court the parties agreed upon the amount of the deficiency, which was less than the amount paid in, and a judgment of no deficiency was entered. Thereafter, the Collector remitted to the taxpayer the difference between the amount paid in and the amount determined by the stipulation. Taxpayer claimed that the estate was entitled to interest on the excess payment. He filed a claim therefor. The claim was rejected and an action was brought to recover the interest. Judge Mathes held:

“The suit at bar is on a ‘different cause or demand’ from that in the Tax Court, since it does not involve the tax liability of the estate of Bernardine Murphy. Rather it is a suit for damages for the alleged retention of money due the plaintiff—interest. (*Stewart v. Barnes*, supra, 153 U.S. at page 464, 14 S. Ct. at page 852, 38 L. Ed. 781.) Moreover, **the matter in issue at bar**—whether or not there was an “overpayment in respect of any internal revenue tax’ within the meaning of I.R.C. § 3771(a)—**was**

not actually litigated or decided in the Tax Court, though determination of that issue is within the jurisdiction of that court. (I.R.C. § 912.) The judgment of the Tax Court, entered pursuant to stipulation of the parties, embodied nothing more than an adjudication 'that there is no deficiency.'

"Thus the principle enunciated in the **Sunnen case, supra**, (333 U.S. 591, 68 S. Ct. 719) that 'Once a party has fought out a matter in litigation with another party, he cannot later renew that duel,' is not applicable here." (Emphasis supplied.)

It follows that the doctrine of res judicata (distinguished from collateral estoppel) is not applicable to the case at bar.

C

Re: Collateral Estoppel.

The doctrine of collateral estoppel is not applicable to the case at bar because the claims for refund, which are the "subject matter" of these actions, were not, and could not be, presented and litigated in the Tax Court proceeding for the obvious reason that the **causes of action were not even in existence**. The causes of action accrued after the decision of the Tax Court became final and the excess taxes were collected.

In **Martin v. Brodrick**, 177 F. 2d 886, (10th Cir.) (a tax refund case), the Court held:

"Certainly a claim is not barred until it comes into being and can be appropriately as-

serted. It has never been thought that a judgment barred a second action, based upon **new facts created by the first.** The fact that both actions arise out of the same subject matter is immaterial. Freeman on Judgments, 5th Ed., Sec. 712, p. 1501.

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“We agree with the Fourth Circuit that the necessity for repose in litigation does not warrant the application of *res judicata* to a **claim which was not in being** when the first claim for refund was filed, and **the existence of which was contingent upon the disposition of that claim.** And especially where, as here, the **jurisdiction** to determine the amount of the claim **rested in another forum.**” (Emphasis supplied.)

In the case *s* at bar, the claims for refund are

“based on new facts created by the first” judgment in The Tax Court and the collection of the deficiency determined thereby. These created the “excess.”

Here, too, the claim was not “in being” when the final judgments in The Tax Court were entered. The claims came **into being** when the collections were made.

The Tax Court had no jurisdiction to entertain any proceeding for the recovery of a “**refund**” or **to determine and order a refund** in the proceedings pending before that Court.

As heretofore pointed out, The Tax Court’s jurisdiction was limited by statute to the determination of a “deficiency” or an “overpayment.” It obviously had no power to determine an “overpay-

ment" in these cases for no "overpayment" had been made at any time prior to or during the pendency of the proceedings in The Tax Court. An overpayment resulted only from the payments that were made **after the decision of The Tax Court became final** and by reason of the determination of that Court.

It is settled beyond question that *res judicata* cannot be predicated upon decisions of a Court (even if made) when the Court has no jurisdiction of the subject matter.

In **Magruder v. Safe Deposit & Trust Co. of Baltimore, 159 F. 2d 913 (4th Cir.)**, the action was brought to recover taxes wrongfully collected. The defendant asserted the doctrine of *res judicata*. The Court held:

"In a leading work in this field, 2 *Freemen on Judgments* 5th Ed., 1925, § 712, at page 1501, it is stated:

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"Id. § 669, p. 1479: 'It is, of course, obvious that **issues outside the jurisdiction of the court to determine, cannot become *res adjudicata* by virtue of its judgment.** But even where the matter is not jurisdictional, a judgment is not ordinarily deemed to be an estoppel as to issues which cannot properly be litigated in the proceedings in which it is rendered.'

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"Every good doctrine or principle of law has sometimes been unduly stretched to encompass injustice. *Res judicata* is no exception. **The propriety of the deduction here claimed is admitted; there was certainly grave**

doubt as to just how the claim could be asserted. We think, under all the circumstances of the instant case, that equity, good conscience and fair play justify Judge Coleman's view that *res judicata* should not serve as a bar to the present action which seeks a deduction of the attorneys' fees here (for the purpose of the federal estate tax) from the gross estate." (Emphasis supplied.)

In **Larsen v. Northland Transp. Co.**, 292 U.S. 20, 54 S. Ct. 584, the Court held:

"The established rule in this Court is that if in a second action between the same parties, **a claim or demand different from the one sued upon in the prior action** is presented, then the judgment in the former cause is an estoppel 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.' (Citing cases.) 'While a defendant must bring forward all purely defensive matter, he is **not barred** by a former judgment against him **as to any matter which he was not bound to present and which was not in fact litigated**. A judgment is not conclusive of those matters as to which a party had the option to but did not in fact put in litigation in the action.' Freeman on Judgments (5th Ed.) § 786." (Matters in parenthesis and emphasis supplied.)

In **Commissioner of Internal Revenue v. Sunnen**, 333 U.S. 591, 68 S. Ct. 715, the Court held:

"But where the second action between the same parties is upon a **different cause or demand**, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, **not as to matters which might have**

been litigated and determined, but **'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.'** (Citing cases.) Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are **free to litigate points which were not at issue** in the first proceeding, **even though such points might have been tendered and decided at that time.**

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"These same concepts are applicable in the federal income tax field.

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"Before a party can invoke the collateral estoppel doctrine in these circumstances, the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment." (Matters in parenthesis and emphasis supplied.)

In **Cromwell v. County of Sac, 94 U.S. 351**, the Court held:

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of the action, the **inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined.** Only

upon such matters is the judgment conclusive in another action.

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“These cases, usually cited in support of the doctrine that the determination of a question directly involved in one action is conclusive as to that question in a second suit between the same parties upon a different cause of action, **negative the proposition that the estoppel can extend beyond the point actually litigated and determined.** The argument in these cases, that a particular point was **necessarily** involved in the finding in the original action, proceeded upon the theory that, if not thus involved, the judgment would be **inoperative as an estoppel.**” (Emphasis supplied.)

In *Mercoid Corporation v. Mid-Continent Inv. Co.*, 320 U.S. 661, 64 S. Ct. 268, the Court held:

“Though *Mercoid* were barred in the present case from asserting any **defense** which might have been interposed in the earlier litigation, it would not follow that its **counterclaim** for damages would likewise be barred. That claim for damages is more than a defense; it is a separate statutory cause of action. **The fact that it might have been asserted** as a counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c **does not mean that the failure to do so renders the prior judgment res judicata** as respects it. (Citing cases.) The case is then governed by the principle that where the second cause of action between the parties is upon a different claim the prior judgment is *res judicata* **not as to issues which might have been tendered** but ‘only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.’” (Matters in parenthesis and emphasis supplied.)

In **Pelham Hall Co. v. Hassett**, 147 F. 2d 63 (1st Cir.), the Court held:

“We believe, on the contrary, that particularly as regards questions of law in tax cases, **collateral estoppel by judgment should be rather narrowly applied.** To minimize the recurring hardship to the taxpayer or prejudice to the revenue (as the case may be), with respect to the taxes for all succeeding tax years, **neither the taxpayer nor the government should be precluded from raising a relevant point of law unless it appears beyond doubt that the precise point was actually contested and decided** (not merely assumed) in the prior litigation.

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“When the taxpayer filed with the Board its petition for review, the indications then were that the transaction would not be held to be a taxfree reorganization.” (Emphasis supplied.)

Under these decisions, the judgment in The Tax Court proceedings does not constitute res judicata or collateral estoppel by judgment.

D

Re: Effect of Rule 50 of The Tax Court of The United States.

On July 14, 1949, The Tax Court first rendered its “findings of fact and opinion” (pages 29 to 70 of the printed record, Joint Exhibit No. 1) in which it merely determined that “all of the advances were contributions to capital and that the resulting worthlessness of a part thereof was not a bad debt”

(page 70). It did not determine the amount of the deficiency, but provided that "decisions will be entered under Rule 50" (page 70).

The Tax Court did not make any determination that there was, or would be, an overpayment as the result of its determination.

Rule 50 of the Tax Court sets up the procedure for making of computation upon which the final judgment is to be entered. It provides:

"If in accordance with this Rule computations are submitted by the parties which differ as to the amount to be entered as the decision of the Court, the parties will be afforded an opportunity to be heard in argument thereon on the date fixed, the Court will determine the correct deficiency or overpayment and enter its decision.

"Any argument under this Rule will be confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the issues or matters already disposed of by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for rehearing or reconsideration." (Emphasis supplied.)

The Commissioner filed a computation in each case based upon the determination that the claimed losses were not bad debts, but capital contributions and computed the deficiencies on that basis.

The partners (taxpayers) did not, and could not, object to the computation submitted by the

Commissioner because it was made in accordance with the decision of The Tax Court and The Tax Court entered its final judgment in each case based upon the computation as submitted by the Commissioner determining the amount of the deficiency in each case. Final judgment was entered thereon and thereafter the deficiencies were collected.

By adding in each case the amount of the deficiencies so determined and collected to the amount of tax paid by each taxpayer on the filing of his return, the total so collected exceeded the amount of the lawful tax liability of each taxpayer to the extent and in the amount agreed upon in the agreed statement of facts according to the computation which the Court might hold applicable.

Defendant contends that the taxpayers should have litigated their right to "refund" in The Tax Court by the proceedings provided for in Rule 50 of The Tax Court. Plaintiffs contend that the issue now before the Court could not have been litigated in the proceeding; that The Tax Court had no jurisdiction to entertain any proceeding for a "refund" and would not have been entertained by The Tax Court if the issue had been tendered it.

Rule 50 only permits the submission of computations to aid the Court in determining the **amount** of the deficiency or the **amount** of "overpayment." The rule was not promulgated or designed to permit the tendering of issues as to the

existence of deficiency or overpayment. Those issues were determined by the findings and opinion. All that the Rule contemplated was **mathematical computation** and not the disposition of questions of fact or law affecting the respective rights of the parties.

The Tax Court could not, under Rule 50, go beyond the scope of determining the amount of deficiency. It could not determine overpayment when **the Court did not, in its findings and opinion, determine that there had been an overpayment.** It could not order a refund under the guise of computation.

The Tax Court took extreme precautions to guard against the use of the procedure for computation under Rule 50 as a vehicle for introducing issues of fact or of law, for in the concluding paragraph of the Rule, it provided:

“Any argument under this Rule will be **confined strictly to** the consideration of the **correct computation** of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to the **issues or matters already disposed of** by such report or of any new issues. This Rule is not to be regarded as affording an opportunity for rehearing or reconsideration.” (Emphasis supplied.)

If the taxpayers had attempted to obtain an adjudication of “overpayment” or “refund” in the proceedings under Rule 50 by objecting to the Commissioner’s computation and submission of its own computations, it would have been **necessary to ten-**

der new issues of fact and of law for determination by The Tax Court.

The taxpayers could not have tendered these issues in their **original petition** to The Tax Court. In order to do so, the taxpayers would have been compelled to admit that the advances were all capital contributions. They could not make such an admission because they believed, in good faith, (although ultimately held to be in error) that they were not capital contributions and that the merchandise delivered were bona fide sales upon which they were compelled by law to pay income tax, since they were on the accrual basis. They were not bound to assume that The Tax Court would decide the issue against them.

Rule 50 has been construed by the Court to preclude the introduction of new issues.

In **Bankers' Pocahontas Coal Co. v. Burnet, Commissioner**, 287 U.S. 308, 53 S. Ct. 150, the Court held:

“Third. After the Board of Tax Appeals had filed its findings of fact and opinion, both respondent and petitioner submitted recomputations of the amount of the deficiency under the Board’s report, as provided by rule 50 of the Board’s Rules of Practice. In **petitioner’s recomputation**, the claim was made for the **first time** that the minimum royalty payments stipulated by the leases had in some instances exceeded the amount of the per ton royalty which would have been payable on actual production, and it was asked that the depletion

allowance be computed upon the basis of the actual payments made, instead of upon the number of tons extracted. Petitioner, at a hearing on the recomputation, tendered evidence in support of this claim. The Board rejected the evidence, and denied petitioner's motion for a rehearing in order to present this contention. The court below upheld this action.

The Board is authorized to prescribe rules of practice and procedure for the conduct of proceedings before it. . . . Rule 50 prescribes the procedure for computing the amount of the deficiency after the Board has heard and decided the issues raised and presented on the merits. In terms, it directs that the hearing on the computation which it authorizes is to be 'confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the determination already made, and no argument will be heard upon or consideration given to * * * any new issues.' The Board has held that under the rule new issues may not be raised and urged on a hearing upon the computation." (Emphasis supplied.)

In Commissioner of Internal Revenue v. Erie Forge Co., 167 F. 2d 71 (3rd Cir.), the Court held:

"The rules prescribed are merely procedural and cannot under any circumstances limit or control the statutory jurisdiction conferred upon the Tax Court. (Citing cases.)

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Morrisdale Coal Co. v. Commissioner, 3 Cir., 1938, 97 F. 2d 272, at page 288, held that a new issue not included in the original proceedings could not be introduced for the first time at a computation proceeding; that it was not a matter of discretion of the Board but was

forbidden by law. See *Commissioner v. Sussman*, 2 Cir., 1939, 102 F. 2d 919, a case apposite to the case under review. There the court sustained the Board's refusal to permit the Commissioner to amend to include an issue not present in the deficiency notice, notwithstanding that if the matter were being considered de novo the item sought to be raised would be most pertinent.

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"The provisions of Rule 50, which precludes consideration of any new issues at that stage of the proceedings, represent a proper exercise of the power of The Tax Court to regulate practice before it." (Citing cases.) (Matter in parenthesis and emphasis supplied.)

In ***Baldwin v. Commissioner***, 94 F. 2d 355, the Court held:

"The Board of Tax Appeals is specifically authorized to prescribe rules for the conduct of proceedings before it. Section 907(a) of the Revenue Act of 1924, as amended by section 601 of the Revenue Act of 1928, 26 U.S.C.A. § 611. Such rules have the force and effect of law. *Bankers' Pocahontas Coal Co. v. Burnett*, 287 U.S. 308, 53 S. Ct. 150, 77 L. Ed. 325; *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117, 46 S. Ct. 215, 70 L. Ed. 494. **The rules prescribed are merely procedural and cannot under any circumstances limit or control the statutory jurisdiction conferred upon the Board.**" (Emphasis supplied.)

In ***Quintana Petroleum Co. v. Commissioner***, 143 F. 2d 588 (5th Cir.), the Court held:

"After the opinion of the Board of Tax Appeals was promulgated, the taxpayer for the first time, by alternate computation, contended

that if the allocable bonus payments or advance royalties in the sum of \$915.42 were excluded from gross income from production for purposes of percentage depletion, then said payments should be deducted from gross income generally in computing the taxable income. Rule 50 of the Board of Tax Appeals, 26 U.S.C.A. Int. Rev. Code following section 5011, directs that the hearing on the computation it authorizes shall be 'confined strictly to the consideration of the correct computation of the deficiency or overpayment resulting from the report already made, and no argument will be heard upon or consideration given to * * * any new issues.' In *Bankers Pocahontas Coal Co. v. Burnet*, 287 U.S. 308, 313, 53 S. Ct. 150, 151, 77 L. Ed. 325, the Supreme Court in referring to this rule said:

“ ‘The Board has held that under the rule new issues may not be raised and urged on a hearing upon the computation.’ ”

Since The Tax Court made no determination or ruling that the taxpayers had erroneously paid taxes on sales, it could not, in the proceeding under Rule 50, undertake to compute the amount of such erroneous tax payment.

For the reasons set forth herein, the failure of the taxpayers to oppose the computation submitted by the Commissioner under Rule 50, does not, and cannot, bar plaintiffs' right to recover the admitted overpayments on the theory of *res judicata* or collateral estoppel.

The decision of The Tax Court in these very cases, conclusively dissipates defendant's conten-

tion that these actions are barred on the theory that the issues could have been litigated in the proceedings in The Tax Court under Rule 50.

In The Tax Court proceedings, an issue was raised as to whether Rose Schnitzer, the wife of Sam Schnitzer, and Jennie Wolf, the wife of Harry Wolf were bona fide partners of the Alaska Junk Company partnership. The taxpayers, in those proceedings, claimed that the Commissioner was barred from making that contention. This contention was predicated on the fact that in a prior Tax Court proceeding, the two wives were recognized and treated as partners **in making the computations under Rule 50** in the prior Tax Court proceedings. In those cases, it was the taxpayer who claimed the application of the doctrine of res judicata or collateral estoppel by reason of the proceeding under Rule 50, while in the cases at bar, the Government takes that position.

The Tax Court held (printed Transcript of Record, Joint Exhibit No. 1, page 54):

“Petitioners contend that the wives’ status as recognizable partners is res judicata and may not now be challenged. They cite this Court’s opinion in their prior proceeding involving partnership income for 1941, and argue that the decision in their favor is conclusive of the issue here raised. Admitting, as they must, that the only error assigned related to the reasonableness of salaries, which the Commissioner had disallowed as a deduction in the computation of partnership profits for 1941, they insist that the Court’s finding of an ex-

isting partnership comprising of wives 'was not merely collateral or incidental, but was material,' because the decision reached could not have been rendered without deciding that particular matter, and such matter was hence 'properly within the issue controverted.' *Packet Co. v. Sickles*, 5 Wall. 580; *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1.

"We are unable to accept this view. In the prior proceeding the wives' status as partners was admitted by respondent, not controverted. And while the prior finding, based on the admission, in *res judicata* as to the parties' tax liability for 1941, *Cromwell v. County of Sac.* 94 U.S. 351, the present proceeding, involving tax liability for subsequent years, is based upon a different cause or demand. Under such circumstances, the Supreme Court held in *Commissioner v. Sunnen*, 333 U.S. 591, that:

" ' the prior judgment acts as a collateral estoppel only as to those matters in the second proceeding which were actually presented and determined in the first suit.

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" ' If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation See *Travelers Ins. Co. v. Commissioner*, 161 F. 2d 93. '

"Since the wives' status as partners was not placed in issue in the prior proceeding, it was not judicially determined. This is no less true because the uncontested finding was reflected in a computation of tax deficiencies under the decision rendered. *Pelham Hall Co. v. Hassett*, 147 Fed. (2d) 63; *Harvey Coal Corp. v. United States*, 92 Ct. Cl. 186; 35 Fed. Supp. 756; *C. D. Johnson Lumber Corporation*, 12 T.C.—(promulgated March 17, 1949. Ac-

cordingly, we hold that recognition of the wives as partners in this proceeding is **not res judicata, and the doctrine of collateral estoppel does not preclude a determination of that issue on its merits now.**" (Emphasis supplied.)

In those cases, the Government maintained, and the Court held, that the proceedings under Rule 50 did not constitute res judicata or collateral estoppel.

Re: Cases Cited by Appellant

The case of **United States v. Sunnen**, *supra*, is not relevant to the question of the application of the doctrine of res judicata or collateral estoppel to cases that come within the exception to **Section 322(c)**.

The impact of the rules of res judicata and collateral estoppel on the exceptions to **Section 322(c)**, was not raised, discussed, referred to, or passed upon by the Court.

The case of **United States v. Clark, Inc.**, 159 F. 2d 489, is not at all in point. In that case, **there was no prior Tax Court proceeding.** The taxpayer asserted a claim for refund. It was rejected and he brought an action for refund. The District Court denied recovery and the decision was affirmed by the Court of Appeal. The taxpayer then filed a **second claim for refund** for the **same amount** asserting different grounds and the Court, by a 2 to 1 decision, held that the first judgment was res judicata.

In the case at bar, there was no prior determination of their rights to a refund. The question was never litigated and could not be litigated until after the Tax Court decision became final and an amount admittedly in "excess" of the true tax liability was collected.

The case of **United States ex rel. Girard Trust Co. v. Helvering**, 301 U.S. 540, 57 S. Ct. 855, does not have the remotest connection with the questions involved. In that case, the Commissioner determined deficiencies in tax. The taxpayer appealed to the Board of Tax Appeals which determined that there was no deficiency in tax and also determined that there had, in fact, been a large "overpayment." The taxpayer instead of bringing an action for refund, sought a writ of mandamus to compel the Commissioner to pay the amounts of the overpayment determined by the Board of Tax Appeals. **The sole question before the Supreme Court was whether the mandamus was the proper remedy.** The Court held that mandamus would not lie and that the remedy was by a "plenary" suit for refund. The case is authority for appellees insofar as the Tax Court held it has no jurisdiction to order or adjudge a "refund" even where it finds that an "overpayment" has already been made. It can only make a determination that there was an overpayment. The Court held that if the Commissioner refuses to refund the overpayment so determined, the remedy is

“by plenary suit in the District Court or the Court of Claims.”

The case did not involve the question of the application of Section 322(c) or the exceptions to that section, or the doctrine of *res judicata*, or collateral estoppel.

The case of **American Woolen Co. v. United States**, 21 F. Supp. 125, Court of Claims; also reported in 18 F. Supp. 783, cited by defendants, is irrelevant. The case did not involve the application of any exception to Section 322(c) and did not involve any “excess” “collected” after the determination of the Tax Court became final. The issue in that case is crystalized in the syllabus No. 3 in the first decision (18 F. Supp 783), which is as follows:

“Although taxpayer, having obtained favorable decision from Board of Tax Appeals (determining an overpayment) can bring suit thereon, taxpayer cannot recover amount of overpayment found by board, **where commissioner has applied overpayment in manner required by law, as by crediting it on a deficiency then due under board’s decision.**” (Matter in parenthesis and emphasis supplied.)

This case is wholly unrelated to any question in the case at bar.

III

THE COURT BELOW CORRECTLY COMPUTED THE AMOUNT OF THE REFUND TO WHICH APPELLEES ARE ENTITLED.

The parties are in agreement that in making the computations of the amount of tax to be refunded, it was proper to deduct from "gross income" the amount of the "sales" which were held by the Tax Court to be "capital contributions." The Court gave judgment for refund on that basis.

Appellant contends that there should also be deducted from the "cost of sales," the cost of the merchandise which was delivered to Oregon Steel and held to be "capital contributions." The Court below rejected this contention.

Appellees submit that appellant's method of computation is erroneous because it ignores, and is contrary to, the basic principle that the net income, which is taxable, is not the profit realized in **each individual transaction**, but is the net income determined from the **operations for the entire year**. It is at the end of the year that economic gain or loss is determined based upon a computation of the entire year's experience.

In order to give effect to this basic principle inherent in the Income Tax Law, there must be deducted from the "gross sales," **all** of the money ex-

pended for the purchase of merchandise during the year and **not only a portion thereof**. All of the money expended in the purchase of merchandise during the year, must be deducted regardless of the manner in which the merchandise was disposed of. That is to say, all of the money expended for merchandise during the year, must be deducted regardless of the fact that the merchandise, or some of it, may have been sold at a profit or sold at a loss, or some of it became worthless through deterioration or other cause.

If some of the merchandise purchased was sold at a loss, or became worthless through deterioration, or other casualty, the cost of that particular portion of the merchandise must still be included in the **total** "cost of sales" for the year.

The taxable net income is not determined by the profit or loss sustained **in any given transaction**. The taxable net income is determined by the total of all "sales" during the taxable year and deducting therefrom the total of **all** cost of purchases during the taxable year, plus the statutory deductions for operating costs, etc.

All of the sales for the full taxable year must be included in the gross income whether the "sales" or any of them were made at a profit or a loss and, on the other hand, all of the costs of the purchases for the whole taxable year, must be reflected whether the goods were sold at profit, at loss, at

cost, or damaged, or destroyed, or otherwise rendered unsalable.

Appellant's theory would reverse this basic principle of the Income Tax Laws because **it would require the isolation of each sale transaction and allocate to it the profit or loss sustained in connection with the particular transaction** and by so doing, there would be created **a fictitious profit** upon which income taxes would have to be paid because to the extent that the cost of "sales" are reduced, the taxable net income is increased.

If a taxpayer purchases in a given tax year, merchandise at a cost of \$100,000.00 (having no prior inventory), that is the amount of deduction that must be made from "gross sales" even though some of the merchandise may have become worthless and unsalable. The taxpayer is entitled to deduct the entire purchase price of \$100,000.00 even though he derives no profit and, in fact, sustains a loss by reason of the loss of a part of the merchandise through deterioration and the like.

ILLUSTRATION

A taxpayer, having no inventory at the beginning of the year, purchases merchandise during the year at a cost of \$100,000.00. He sells \$90,000.00 worth of that merchandise during the year for \$150,000.00 and \$10,000.00 of that merchandise becomes valueless. What is the taxpayer's net income for the year? Obviously, the net income is

only \$50,000.00 because he paid \$100,000.00 for the merchandise during the tax year. If the cost of "sales" were to be reduced by \$10,000.00, represented by the valueless merchandise, the taxpayer was compelled to report the cost of sales for the year at \$90,000.00 (as appellant now contends), the result would be a net profit of \$60,000.00, whereas the actual difference between all of the money spent for merchandise and the amount realized on the sale hereof, was only \$50,000.00. Appellant's theory of the computation would make the taxpayer subject to taxation on an additional net income of \$10,000.00, which he never realized. **The loss of his merchandise would then be converted into a taxable profit.**

We submit that this is an entirely unrealistic concept and is inconsistent with the general scheme of the Income Tax Law which taxes only economic gain ascertained and determined on an entire year's operations.

True net income can only be determined by charging against the "sales," the cost of all merchandise purchased and not only a portion thereof.

The situation in the case at bar is the same as in the illustration. The merchandise delivered by the Partnership to the Corporation was bought and paid for by the Partnership along with all of the merchandise purchased by the Partnership during the year in question. In reporting its "sales" for

the year, the Partnership properly deducted the cost of all merchandise purchased during the year.

The merchandise, which the Partnership delivered to the Corporation, turned out to be worthless just like the merchandise destroyed by deterioration in the illustration.

By no stretch of the imagination can the loss of that merchandise be converted into profit by the simple process of deducting the cost of that merchandise from the total of the purchase price of all merchandise bought during the tax year.

The adoption of appellant's computation would result in a fictitious profit. The loss would be converted into a taxable gain.

We submit that the computation adopted by the Court below was proper and should be affirmed.

Throughout the brief, appellant emphasizes the alleged fact that the "sales" to Oregon Steel were made at cost. We see no relevancy in that fact. All "sales" must be included in gross income, whether the "sales" were made at a profit, at cost or at a loss, and the "cost of sales" must, likewise, include all merchandise purchased whether disposed of at a profit, at cost, at a loss or rendered valueless. The total of each of the two columns determines the over-all profit or loss from the entire year's operations.

CONCLUSION

The outstanding fact in these cases is that there was collected from the appellees an amount in excess of their tax liability for the year. This is admitted by appellant.

The retention of the excess collected by the Government has been characterized by the Supreme Court as

“immoral and amounts in law to a fraud on the taxpayer’s rights.” (Bull v. United States, 295 U.S. 247.)

Section 322(a) of the Internal Revenue Code is a remedial statute designed to avoid such consequences and should be liberally construed to effectuate its purpose of restoring to the taxpayer what was unjustly taken from him.

The limitations placed upon the collection of refunds in **Section 322(c)** and its exceptions, must be construed in the light of the remedial purpose of subsection (a) and the bar should not be applied unless there is a clear statutory mandate therefor. A statute which would deprive the taxpayer from recovering what is justly due him, must be strictly construed and if the statute is ambiguous or susceptible of more than one construction, it should be construed in favor of the taxpayer. The exceptions to **322(c)** were incorporated to protect the taxpayers from the operation of the bar under the conditions described therein and these exceptions

should be given effect. Exception No. 2 applies to the case at bar and should be given effect.

Appellant has not cited any authority in support of the computation contended for by the appellant. No reason in justice, equity or fairness is advanced in support of its contention. It is contrary to the basic principles applicable to the determination of taxable net income and should be rejected here as it was in the Court below.

The judgments, appealed from, should be affirmed.

Respectfully submitted,

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No. 15,016
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SALOMON R. SANDEZ, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15,016

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

SALOMON R. SANDEZ, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment of the United States District Court for the Southern District of California adjudging appellant to be guilty of three counts of an indictment involving other co-defendants; Count Eight [T. 5],¹ the importation of approximately 40 ounces of morphine into the United States from Mexico; Count Nine, the facilitation and transportation of the same quantity of morphine, both of which counts are charged to be offenses in violation of Title 21, United States Code, Section 174, and Count Ten [T. 6], conspiring with others in violation of Title 18, Section 371 of the United States Code, to commit offenses against the United States in conspiring to bring narcotic drugs into the United States in violation of Title 21, Section 174 of the United States Code.

¹The abbreviation "T" hereafter refers to "Transcript of Record," the clerk's.

The violations are alleged to have occurred in Los Angeles County, California, and within the Central Division of the Southern District of California.

The jurisdiction of the district court was based upon Section 3231 of Title 18, United States Code. This court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

Statement of the Case.

Appellee adopts the statement of facts as set forth in appellants' opening brief with the following additions: Inasmuch as this appeal is had by only one of the defendants it is deemed appropriate to focus attention to the facts of the case that pertained to the appellant Sandez. It is to be observed that the initial negotiations leading up to the arrest, which arrest occurred on April 15, 1955, were had between a federal narcotic agent, the witness Lawrence Katz, Katz using the name of Benny Lean, who first talked to the defendant Perno over the telephone on March 12, 1955. [R. 18.]² Following this conversation arrangements were made whereabouts dealing in narcotics between Perno and Katz followed. These were the subject matter of evidence that was introduced supporting the conviction of Perno on Counts 1, 2, 3, 4, 5 and 10.

In the course of the negotiations between Agent Katz and Perno, we find that on the morning of April 15, 1955, Perno came to the Hotel Constance in Pasadena where the Agent Lawrence Katz was registered and told

²Reporter's Transcript shall throughout be abbreviated by "R."

Agent Katz that everything was alright and elaborated that his, Perno's connection, was one called "Tutu" who had brought two kilos of heroin from Mexico the previous day and stated that this person had come from Tijuana. Perno further advised Agent Katz at this meeting that "Tutu" was a nephew of the Governor of Lower California and that everything was alright and explained how the arrangements for the delivery of the drugs would be had and the payment therefor. [R. 60-61.] Perno told Agent Katz to place \$25,000 in a foot locker of a Greyhound Bus Terminal, Agent Katz to retain the key until he was satisfied with the narcotics to be sold for this price. [R. 68.] Perno also told Katz to go to Rays Motel located in the 6300 block on South Figueroa in Los Angeles and to thereafter call Perno at a telephone number given to Agent Katz, namely, Pleasant 8-1879. This telephone number was written down on a card retained by Agent Katz. [R. 62-63; Ex. 6.]

This phone number, Pleasant 8-1879, is significant to this case as it was the telephone number of the co-defendant Golden Elliott whom, for want of a better characterization, we will term the "girl friend" of defendant Perno. This phone number was found written on a reverse side of a card taken from the possession of the defendant Flores subsequent to his arrest. [Ex. 25; R. 355 and 358.] At the time of the search of the appellant Sandez, subsequent to his arrest, a like business card of the same doctor was found in the possession of the appellant Sandez. [Ex. 30; R. 466-469.] Written in pencil on the reverse side of this doctor's business card was the following: "Vince. Pleasant 9-7818." [It will be observed that the numbers of this phone number

written upon the reverse side of Ex. 30 that was taken from the possession of the appellant Sandez was the same phone number as that of Golden Elliott excepting the numerals were written in reverse fashion.] It is also to be observed that a business card bearing the name of this same doctor, namely, "Dr. Eloy Avando H., Medico," upon the back of which was written "Freddie Sandez, Avenita F15, Apartment C. Tijuana, B. C." was taken from the person of Perno following his arrest. [Ex. 27; R. 397-398.]

Agent Katz further testified that he had occasion to investigate the location of the phone number Pleasant 8-1879, that it was 6603 South Avalon Boulevard and that such phone was listed to the name of defendant Golden Elliott. [R. 64.] It is to be observed that Officer Landry, a Deputy Sheriff of Los Angeles County attached to the Narcotics Detail, together with fellow officers, saw defendants Greer and Brown enter Elliott's apartment at 6603 South Avalon Boulevard at about 2:30 p.m. on April 15, 1955, but did not see Brown or Greer come out of such apartment but next saw them in the vicinity of the Main Motel at about 8:00 p.m. on the evening of April 15, 1955, when Brown and Greer were placed under arrest. [R. 436-438.]

Agent Katz further testified that he, Perno, and another officer drove to a Greyhound Bus Terminal and placed money in a locker located in such terminal retaining possession of the key, at about which time Perno told Katz that the reason for the delay was that his connection, "Tutu," had to leave the previous night for Tijuana because "Tutu's" wife was having a baby, and "Tutu" was expected back to Los Angeles momentarily and that it should not take much longer. [R. 68.] Katz testi-

fied that on that same evening at about 6:30 p.m. he called Perno at the Pleasant number and talked to Perno, that later on that same evening he called the same Pleasant number and talked to a person who identified herself as "Goldie" and asked where Vince was, Vince being the first name of the defendant Perno, and was told by Goldie that Perno was on his way over to see him (Katz) and that shortly thereafter Perno arrived at the Ray Hotel where Jones and Katz were waiting. [R. 69.]

The following events are certainly not in dispute and they are those whereby Agents Katz and Jones were directed by Perno to go to the New Main Motel located at 71st and Main Streets. This is the location where the larger quantity of heroin was seized from a cabin after defendants Greer and Brown had left such cabin and after defendant Perno was shot as he apparently attempted to shoot one of the Federal Narcotics Agents.

The narcotics recovered at this occasion are the same narcotics as are the subject of Counts 8, 9 and 10. Prior to the arrest of appellant Sandez, it is to be noted Deputy Sheriff Ruskin together with other officers, and particularly Deputy Buchanan, had followed Perno and Katz from the motel on Figueroa Street to the New Main Motel on 71st and Main Streets. [R. 349.] Officer Ruskin testified that he had observed Sandez standing on the corner and a 1953 Chevrolet convertible parked behind his vehicle with another person sitting in it, who later proved to be the defendant Flores, and that he observed the license plates of the automobile not to be of California origin and later observed the plates to be from Baja, California. Subsequent to the arrest of Sandez an insurance identification card [Ex. 26] covering a 1953 Chevrolet made out in the name of Salomon R. Sandez

was recovered from the wallet of the defendant Sandez. [Ex. 26; R. 359-363.]

Officer Ruskin described the conduct of appellant Sandez as follows:

“A. I saw Sandez on the corner. I saw him look around. He looked across to the motel. He was approximately the width of the street directly across from Room No. 1.

He walked there, looked around, sort of wrung his hands around, looked around again, and walked back to his vehicle, and got into the car. He then got out again, walked back to the corner again, looked around, and he sort of stared at our car for quite a while, looked at the motel, looked up and down the street, and looked toward the defendant Perno's car.

He walked back to his vehicle again, and got into it.” [R. 350-351.]

Officer Ruskin further testified that on that same evening he had seen the defendants Greer and Brown walk out of Apartment 1 of the New Main Motel shortly after 8:00 o'clock; he was present when a shot rang out whereupon he took defendants Sandez and Flores into custody. [R. 351-352.]

Ruskin testified to a conversation that he had with Sandez which is as follows:

“A. At the time of taking Sandez and Flores in custody, suspect Sandez stated, ‘I am not doing anything. What do you want? I am just waiting for somebody,’ in approximately those words, not in my exact words. He said, ‘I am waiting for a guy. We are not doing anything.’

And Flores stated also they weren't doing anything. And upon bringing the car over to the parking lot, I started to search the car, and while searching the car, I had the lights on, and Mr. Sandez asked me to please turn off the lights, as there was a weak battery."

Q. Did he say that in English to you? A. He said it in English." [R. 354.]

Officer Ruskin testified he did not speak Spanish "at all." [R. 352.]

Officer Ruskin testified to an additional conversation that he had had later in the night of April 15 in the Narcotics Office in the Federal Building at Los Angeles stating that he spoke English to both Sandez and Flores, whereupon Sandez gave his age, presented a business card stating that he, Sandez, had a cafe in Tijuana, a bar and several taxicabs. It appears that Sandez had some difficulty in speaking English whereupon Flores helped translate while the booking slip was being filled out. [R. 364-365.] Upon cross-examination, Officer Ruskin explained the manner of conducting his conversations with the defendant Sandez. [R. 372.] He also stated that Sandez had asked him to turn off the lights of the car because of a weak battery. [R. 375.]

Deputy Sheriff Buchanan of the Narcotics Detail, who accompanied Officer Ruskin on the surveillance both of the motel on Figueroa Street and later at the motel at 71st and Main Street, is the one who actually arrested appellant Sandez. He stated that he saw Sandez and Flores in the Chevrolet convertible parked directly behind their car. Concerning the movements of Sandez he testified as follows:

“A. Well, defendant Sandez, I observed him walk on the north side of—that would be the north side of 71st street, towards the corner of Main Street. Then he walked back and out of my view to his automobile, which was behind me.

Then a short time later he walked again to the corner, and then north on Main Street out of my view, and back around, and back into his car, and then a short time after that there was a shot—that Agent Katz came outside and fired a shot in the air, and I went back in company with—

Q. Did you then put defendant Sandez under arrest? A. Yes, sir, I did.” [R. 466.]

Deputy Buchanan also testified that he conducted a search of the defendant Sandez and thereupon found Exhibit 30, the doctor’s card which upon the opposite side had the phone number listed to the defendant Golden Elliott written in reverse fashion. [R. 466-467.] It is to be observed that the arrest of Sandez was made after Officer Buchanan had observed Agent Katz come outside of one of the cabins of the motel and fire a shot in the air. Buchanan stated that his suspicion was aroused when Sandez went up to the corner and looked over to the car the officers were in. [R. 471.] Officer Buchanan likewise related what Sandez had stated after he had handcuffed Flores and Sandez together, relating that he had spoken to Sandez in English. [R. 472.]

The defendant Golden Elliott took the stand, related that she lived at 6603 South Avalon, admitted an acquaintance with the defendant Vince Perno [R. 567-568], stated that she had permitted Perno to leave personal belongings in her apartment. [R. 569.] Upon cross-examination it was elicited that on April 15, 1955, Mrs. Elliott’s phone number was Pleasant 8-1879.

After the jury had deliberated for some period of time a verdict was arrived at for all defendants except Elliott. [R. 778.] The Government stated that it did not feel the evidence was sufficient to hold defendant Golden Elliott and the court granted a motion acquitting the defendant Elliott. [R. 773 and 786.]

Federal Narcotics Agent Jones testified concerning conversations he had in the evening of the arrest in the Federal Building when he interrogated both defendants Sandez and Flores at which point an objection was made on behalf of Sandez that such conversations were immaterial because no *corpus delicti* was established. [R. 178.] The court overruled such objection and explained the law as understood by the trial court with respect to receiving any such possible admissions. [R. 179.] Agent Jones stated that he identified himself to Sandez as a Federal Agent, advised Sandez that he need not give a statement, that he was speaking to him in English. He testified as follows [R. 181-182]:

“A. I asked defendant Sandez if that was his correct name. He said, ‘Yes.’

Q. He said what? A. He said, ‘Yes.’ I then asked the defendant Sandez if he was also known as Tutu.

Q. What did he say to that? A. ‘That’s right.’

* * * * *

A. I asked the defendant Sandez if he and the defendant Flores had come to the Los Angeles area from Mexico in the 1953 yellow Chevrolet convertible carrying the narcotics.

Q. And did he answer that question? A. He said, ‘Yes.’

Q. Do you recall anything further said about that during the course of your interrogation of the

defendant Sandez? A. Yes. He stated that he was the owner of the El Gato Negro Bar in Tijuana. He produced a card, a business card of some kind, to verify this. He stated also that he had some taxi cabs in Tijuana.

That was just about the limit of the conversation at that time.

Q. That was the substance of your conversation?

A. Yes."

Statutes Involved.

So far as pertinent to this appeal Counts 8 and 9 were brought under Title 21, United States Code, Section 174; Count 10 being brought under the conspiracy statute, Title 18, United States Code, Section 371, a conspiracy in violation of the provisions of Title 21, Section 174. So far as pertinent to this appeal, Title 21, United States Code, Section 174 provides as follows:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be . . ."

* * * * *

"Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

ARGUMENT.

I.

The Defendant Sandez Was Not Denied Due Process of Law. He Was Properly Arraigned.

Commencing on page 17 of appellant's opening brief, argument is advanced that this defendant was not accorded due process of law, the contention being urged that he was not arraigned. We agree that all defendants are entitled to an arraignment. We further agree that even though there was no treaty with the Mexican Government covering this particular subject, this defendant, indeed even enemy aliens, is entitled to due process of law.

Subsequent to the filing of appellant's opening brief, a stipulation had been entered into whereby there is now before this court a supplemental clerk's transcript of record which contains copies of the "Minutes of the Court" had on May 23, 1955, first before the Honorable Peirson M. Hall who on such date transferred the case to Judge Leon R. Yankwich, secondly the "Minutes of the Court" on May 23, 1955, before Judge Yankwich from which minutes it clearly appears that the defendant Sandez while then and there represented by his counsel, Paul Angeliello, was arraigned. So there could be no doubt on the matter it was likewise stipulated that the reporter's transcript of the proceedings had on May 23, 1955, be made a part of the record on appeal and there has been supplied to this court an original reporter's transcript of the arraignment held before Judge Yankwich on Monday, May 23, 1955. We have seen fit to have such reporter's transcript accompany our brief as an appendix thereto. On page 3 and thereafter of such reporter's transcript of the proceedings of May 23, 1955,

before Judge Yankwich, it clearly appears that Sandez was arraigned, that the reading of the indictment was waived, Sandez through an interpreter pled not guilty to each of the three counts in which he was charged in the instant indictment.

Even though Sandez had not been arraigned the law seems to be settled that the right to be arraigned and to make a plea are waived by going to trial.

Beaty v. United States, 203 F. 2d 652, 654 (C. A. 4, 1953).

The record clearly shows that when the case was called for trial no assertion was made by Sandez's counsel that he had not been arraigned. In fact the only defendant that was not arraigned was the defendant Eddie Sonneli and he was not arraigned because he had never been apprehended.

An arraignment is not necessary to constitute due process of law where the accused has had sufficient notice of the accusation and an opportunity to defend himself.

Garland v. Washington, 232 U. S. 642-645 (1914).

It has been stated that a record citing an accused's arraignment in open court before trial and his plea of not guilty to the indictment imports verity and cannot be contradicted by the accused unsupported assertion that he did not know of the accusation until the date of trial.

Yodock v. United States, 97 Fed. Supp. 307, 310 (D. C. Pa., 1951).

To like effect:

Caldwell v. United States, 160 F. 2d 371 (C. A. 8, 1947).

II.

The Corpus Delicti Had Been Established as to All Counts to Which Sandez Was Convicted and His Admissions Made After His Arrest Were Properly Received.

This court as recently as April 10, 1956, in *Ryno v. United States*, 232 F. 2d 581, re-announced the rule that evidence corroborating appellant's confession need not independently prove the commission of the crime charged either beyond a reasonable doubt or by a preponderance of evidence, and indicated that the same rule applied to admissions.

It is frequently forgotten that the *corpus delicti* does not properly include as a third element the agency of the accused as the criminal. In other words, the phrase *corpus delicti* does not include the fact of connection of the accused to the crime nor his identity as the criminal, nor that he is the guilty agent through whom wrong has occurred.

United States v. Echeles, 222 F. 2d 144, 155-156 (7th Cir., 1955).

The rule of corroboration does not require proof beyond a reasonable doubt. Neither does it require direct evidence, circumstantial evidence may be sufficient for such purpose. *Ercola v. United States*, 131 F. 2d 354, 358 (C. A. D. C.) at page 358:

“The rule of corroboration, it will be remembered, does not require proof beyond a reasonable doubt. Neither does it require direct evidence. Circumstantial evidence may be sufficient for that purpose.
. . . .”

As was said in *United States v. Kertess*, 139 F. 2d 923 (C. A. 2), cert. den. 321 U. S. 795 on page 929:

“Any corroborating circumstances will serve which in the Judge’s opinion go to fortify the truth of the confession. Independently they need not establish the truth of the *corpus delicti* at all, neither beyond a reasonable doubt nor by a preponderance of proof.”

As to proof of the identity of the perpetrator of the act or crime as not being a part of the *corpus delicti* see *United States v. Di Orio*, 150 F. 2d 938 (C. A. 3, 1945), cert. den. 326 U. S. 771. To like effect see:

George v. United States, 125 F. 2d 559, 563 (C. A. D. C., 1942).

In a relatively recent narcotic case the above principles are reaffirmed. The extra confessional proof required need not of itself preponderantly establish the guilt of the defendant and if it shows by independent facts that crime has been committed against which the jury can measure the reliability and the consistency of defendant’s own statements, such is sufficient corroboration. See:

United States v. Markman, 193 F. 2d 574, 576 (C. A. 2, 1952).

The Supreme Court has recently clearly stated the rule with respect to corroborative evidence independent of the statements to establish the *corpus delicti*. In *Opper v. United States*, 348 U. S. 84, 93 (1954), the court stated the rule:

“However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is necessary, therefore, to require the Government to introduce substantial independent evi-

dence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. *Smith v. United States, post*, p. 147. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt." (P. 93.)

The Supreme Court likewise stated the rule in *Smith v. United States*, 348 U. S. 147, 156:

"There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty."

Tested by the above principles it is seen in the instant case that before Sandez made any admissions either immediately after his arrest or when later questioned at the Federal Building on the night of his arrest, that a crime or crimes (those later charged in Counts 8, 9 and 10) had been committed. The evidence clearly shows that the quantity of heroin found in the cabin at the motel at 71st and Main Streets which was the same heroin as that involved in Counts 8 and 9 had been found under circumstances indicating the commission of a crime by

someone. This being so the admissions made by Sandez were shown to be trustworthy by reason of the independent evidence establishing the criminal means or *corpus delicti* and were properly received to be considered by the jury. The court gave instructions pertinent to this phase of the case, instructing the jury that any statement or admission made after the arrest must be considered as having been made after the criminal conspiracy had ended and could be considered only in connection with the guilt or innocence of that person. [R. 742.]

The rule has been stated in the *Braswell* case, subsequent to the *Opper* and *Smith* opinion, *supra*, and in light of such opinions, that the corroborative evidence need not be sufficient, independent of the statements, to establish the *corpus delicti*. It is only necessary that the government introduce substantial independent evidence tending to establish the trustworthiness of the admission. It is enough that the independent evidence supports the essential facts admitted sufficiently to justify a jury's inference of their truth. When this test has been met the evidence as a whole must be sufficient to find guilt beyond a reasonable doubt.

Braswell v. United States, 224 F. 2d 706, 711
(C. A. 10, 1955).

(a) Substantial Evidence.

This court has held that a conviction may be sustained where the substantial evidence is conflicting upon the premise that the conflict is to be resolved in favor of the appellee, *i.e.*, if there is substantial evidence to support the verdict.

Todorow v. United States, 173 F. 2d 439 (C. A. 9, 1949), cert. den. 337 U. S. 925.

Substantial evidence has been defined as being such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Battjes v. United States, 172 F. 2d 1 (C. A. 6, 1949).

To like effect in defining what is meant by substantial evidence this circuit is in accord with the aforementioned case. *Woodward Laboratories, Inc., et al. v. United States*, 198 F. 2d 995 (C. A. 9, 1952), p. 998:

“Substantial evidence is * * * such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *.”

III.

The Search of the Appellant Sandez Was Incident to a Lawful Arrest and Was a Reasonable Search.

It is to be observed from both the testimony of Officer Ruskin and also Officer Buchanan that Sandez was not arrested until after the hearing of a shot fired by Agent Katz who had just emerged from a cabin of the motel where the transfer of this relatively large quantity of heroin had taken place between Perno and Katz. [R. 466.] Following the arrest of Sandez a cursory search was conducted and upon his person was found Government Exhibit 30. This is the doctor's card upon which backside was the writing: “Vince Pleasant 9-7818” which is the phone number of the defendant Golden Elliott, the numerals being written in reverse fashion.

The record is clear that on April 15, Agent Katz had contacted Perno by calling him on Golden Elliott's phone number Pleasant 8-1879. Vince Perno had given this phone number to Katz. [R. 62-63.] It is but logical to assume that a carrier of narcotics, be he a co-conspirator

or a confederate of Perno, could be expected to have such phone number, and an additional consciousness of guilt is to be noted when the numerals of this phone number were placed on this card [Ex. 30] in the reverse fashion of the true phone number at the apartment of the defendant Golden Elliott.

Counsel representing Sandez was content to make no objection upon the ground of an alleged illegal search and seizure following the arrest of appellant Sandez. His only objection was the manner which counsel representing the Government were interpreting Exhibit 30 when it was presented in evidence. [R. 467-469.]

Rule 41(e) of the Federal Rules of Criminal Procedure sets forth the procedure to be followed by a person contending a grievance by an unlawful search and seizure. No motion to suppress was filed prior to trial. Sandez's counsel elected to waive a motion to suppress such card when he became aware of its existence when produced at the trial. This we feel constitutes a waiver of a matter which should not be raised for the first time on appeal. This court has quite recently discussed the principles of law attendant to the right of arrest and search without a warrant when a felony has been committed. See *Kremen v. United States*, 231 F. 2d 155, 167 (C. A. 9, 1956) and there discussed the outstanding Supreme Court cases pertaining to the right of a search of a person incident to an arrest. Quoting from cases that clearly announce that it is only *unreasonable* searches and seizures that are prohibited by the Fourth Amendment. This court there stated on page 168:

"It is hornbook law that officers have the right to arrest without a warrant when a felony is being committed in their presence."

The lawfulness of an arrest has been decided by the Supreme Court to depend upon the law of the state of the arrest. *United States v. Di Re*, 332 U. S. 581 (1948); *Johnson v. United States*, 333 U. S. 10 (1948). In this state California Penal Code, Section 836, sets forth the grounds for arrest pertaining to arrest by peace officers. This section of the Penal Code is set forth on page 27 hereof. It is submitted that Officer Buchanan under the facts which must have been related to him from previous contacts with his fellow officers and which were observable, had probable cause for making the arrest of Sandez under one or more of the grounds set forth in the Penal Code, Section 836. He had reason to believe that a felony had been committed.

No effort was made in the cross-examination of Officer Buchanan to elicit facts that may have been known to him as is illustrated by the case of *People v. Bowles*, the case cited on page 27 of appellant's opening brief, 45 Cal. 2d 652 (1955). The *Bowles* case is not contrary to the government's position in the instant case, as it points out that the defendant was not in a position to challenge the failure of the record to establish the basis for the officers' belief, because of objections the defendant had interposed when the prosecuting attorney had sought to establish the basis of the officers' probable or reasonable cause. The California Supreme Court continues to state at page 656;

"It is settled, however, that reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt. (*Brinegar v. United States*, 338 U. S. 160, 171-176.)

. . . ."

The case of *People v. Brown*, 45 Cal. 2d 640 is not parallel to the facts in the instant case. This case is referred to by appellant on page 27 of their opening brief. The appellant in the *Brown* case was not placed under arrest. The facts in the case indicate that the officers there arbitrarily seized Irma Brown without having any reasonable cause to believe that she was committing a public offense.

An additional California case urged by the appellant is that of *People v. Cahan*, 44 Cal. 2d 434. We have no quarrel with the ruling of that case in the departure of the Supreme Court of California of its former views concerning this subject. We believe it is in full accord with the Federal rule, but we are at a loss to understand its application to the facts of the instant case. In the *Cahan* case dictaphones were unlawfully placed in the quarters of persons engaged in the horse racing booking enterprise. Flagrant violations of constitutional guarantees against unreasonable search and seizure occurred. The evidence thus obtained was unconstitutionally obtained. The facts of the *Cahan* case are dissimilar with the obtaining of Exhibit 30 which were derived from appellant Sandez subsequent to his valid arrest.

In passing, we call attention that the Supreme Court of the United States has held that where the entry was lawful, no unreasonable search and seizure occurs where the officer has a concealed microphone.

On Lee v. United States, 343 U. S. 747 (1952).

It is, of course, true that in certain instances the appellate courts have acknowledged the illegality of an unlawful arrest even though not raised at the trial court. However, the weight of authority is that such alleged error may

not be assigned for the first time on appeal. The following cases support this:

United States v. Jones, 204 F. 2d 745 (7 Cir., 1953). The last mentioned case pertains to a narcotic charge where at trial no contention had been made that the arrest was illegal. The appellate court did not feel such alleged error should be raised for the first time on appeal. To like effect see *Stein v. United States*, 166 F. 2d 851, 855 (C. A. 9, 1948). In the case of *Wyche v. United States*, 193 F. 2d 703 (C. A. D. C., 1951) no motion to suppress had been made in the trial court. The appellate court held that it would not substitute its judgment of proper trial tactics for that of the lawyer of the forum.

It has been held that where a defendant did not move before trial to suppress evidence allegedly illegally seized or explain his failure to do so no complaint could be made on appeal of the admission of such evidence.

Comer v. United States, 142 F. 2d 697, 699 (C. A. D. C., 1944).

In an exhaustive opinion pertaining to the seizure of altered postage stamps the Supreme Court held where the search was made incident to arrest, the opportunity in time to get a search warrant was immaterial. *United States v. Rabinowitz*, 339 U. S. 56 (1950). The opinion points out there can be no rule of thumb requiring that a search warrant must always be procured, that the judgment of the officers as to when to close a trap on a criminal committing a crime in their presence and who they have reasonable cause to believe is committing a felony, is not determined solely upon whether there was time to procure a search warrant. Flexibility should be accorded such law officers and the test is not whether

it is reasonable to procure a search warrant, but whether the search was reasonable upon all the facts and circumstances and the total atmosphere of the case. Even in the case of *McDonald v. United States*, 335 U. S. 451 (1948), pertaining to the conducting of a lottery, while the court held the search to be unreasonable still the court held so because there was no emergency which justified the non-procurement of a search warrant.

In the case of *Brinegar v. United States*, 338 U. S. 160 (1949), the court on page 175 commented as follows:

“In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved.

“‘The substance of all the definitions’ of probable cause ‘is a reasonable ground for belief of guilt.’ *McCarthy v. De Armit*, 99 Pa. St. 63, 69, quoted with approval in the *Carroll opinion*. 267 U. S. at 161. And this ‘means less than evidence which would justify condemnation’ or conviction, as Marshall, C. J., said for the Court more than a century ago in *Locke v. United States*, 7 Cranch 339, 348. Since Marshall’s times, at any rate, it has come to mean more than bare suspicion: Probable cause exists where ‘the facts and circumstances within their (the officers’) knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed. *Carroll v. United States* 267 U. S. 132, 162.”

It must be observed in the instant case that Officer Buchanan when he arrested Sandez was operating in an emergency. No opportunity presented itself to secure a search warrant. Furthermore, the logical inference is that Officer Buchanan must have been apprised of facts from contacts with his fellow officers that Perno was working with confederates or co-conspirators. When he heard the shot ring out he was justified in acting as he did. Probable cause existed and the later search conducted of Sandez following his arrest was not unreasonable.

The case of *United States v. Di Re*, 332 U. S. 581, recognizes the distinction between an arrest without a warrant for a misdemeanor not occurring in the presence of the arresting officer as compared to a felony. This distinction between a misdemeanor and a felony upon which later type of offense the officer had reasonable grounds to believe the suspect had committed is recognized by the court (p. 591). In the instant case, the crime Sandez was suspected to be a participant in was unquestionably a felony, hence the officer was not required to have witnessed its commission if he had reasonable grounds to believe the suspect had committed a felony or that a felony had in fact been committed.

A case somewhat similar in the contents of a paper taken from an accused when arrested and which clearly supports the reasonableness of the arrest of such suspect is *United States v. Heitner*, 149 F. 2d 105 (C. A. 2, 1945), the court stated with respect to the seized paper (p. 106):

“Heitner’s other complaint is of the admission against him of a paper found in his pocket at his arrest which bore the telephone number of a prune

pitter. The still was being used to make a liquor out of prune juice; and there was ground to infer from Heitner's carrying such a telephone address that he wished to make use of the prune pitter to pit the prunes whose juice he distilled. As to its competency, it has long been established that the person of one lawfully arrested may be searched, and that anything found may be used against him. *Agnello v. United States*, 269 U. S. 20, 30."

It is not our desire to overburden the court with a long list of authorities; however, we feel the following discussion may be of some assistance in connection with the problem now before the court.

The legality of arrests, searches, and seizures without warrants has received judicial recognition, and the general problems of their legality are certainly not matters of first impression in this Circuit. *Symons v. United States*, 178 F. 2d 615, 619 (C. A. 9, 1950); *Leong Ching Wing v. United States*, 95 F. 2d 903 (C. C. A. 9, 1938); *Papani v. United States* 84 F. 2d 160 (C. C. A. 9, 1936), reversed because the search was not made at the place of arrest; *Donahue v. United States*, 56 F. 2d 94 C. C. A. 9, 1932), to cite but a few cases in which this court has considered such issues.

In *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 357, dealing with the question of whether the officer had "reasonable grounds to believe that the person so arrested is guilty of such felony," the court stated: "There is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." And this court has adopted this

view, quoting the above works in the *Rocchia* case, *supra* (78 F. 2d at 969).

Succinctly restating the applicable principles, 4 *American Jurisprudence* (1939), Arrest, Par. 25, p. 18, says:

“An officer with authority to conserve the peace has, in making arrests, all the common-law authority of a constable or watchman and may, without a warrant, arrest any person who has committed a felony in or out of his presence or who has attempted to commit a felony in his presence. He may arrest any person who he, upon reasonable grounds, believes has committed a felony, even though it afterwards appears that no felony was actually perpetrated.”

And, as stated further in that work, Par. 48, pp. 33-34:

“Probable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. Yet probable cause does not depend on the actual state of the case in point of fact, as it may turn out upon legal investigation, but on knowledge of facts and circumstances which would be sufficient to induce a reasonable belief in the truth for the officer to see and know that the law is being violated. Nor is it necessary for him to satisfy himself beyond question that a felony has in fact been committed, to justify an arrest without a warrant, though he may not act on unsubstantial appearances or unreasonable stories.”

Again, referring to the *Papani* case, *supra* (p. 163), this Circuit has held that:

“The probable cause, which must exist to enable an officer to arrest for the commission of past felo-

nies, is defined in *Stacey v. Emery*, 97 U. S. 642, 645, 24 L. Ed. 1035, as follows:

“‘If the fact and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.’”

See also, *Carroll v. United States*, 267 U. S. 132, 161, quoting this language with approval; *Kwong How v. United States*, 71 F. 2d 71 (C. C. A. 9).

As also stated in the *Carroll* case, *supra* (p. 161), quoting from *Commonwealth v. Carey*, 12 Cush. 246, 251:

“* * * if a constable or other peace officer arrest a person without a warrant he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one of his own knowledge of facts, or on facts communicated by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful * * *.”

“The substance of all definitions is a reasonable ground for belief in guilt.”

A district court opinion wherein the subject matter of search and seizure and arrest without a warrant has been carefully considered, and where many of the authorities have been reviewed, is that of *United States v. Bell*, 48 Fed. Supp. 986 (D. C. Cal.). We quote from page 992:

“Courts thus make reasonableness not a matter of abstract theory, but a pragmatic question, to be determined, in each case, in the light of its own circumstances.”

In this connection and as is indicated in the *Di Re* case, 332 U. S. 581, “* * * the arrest by judicial process for a federal offense must be ‘agreeably to the usual mode of process against offenders in such states,’ ” in the absence of an applicable federal statute. We cite for the court’s observation the California statute pertaining to arrests by peace officers, namely, Section 836 of the California Penal Code:

“§836. *Arrests by peace officers: (Arrest under warrant or without warrant in certain cases authorized).*

A peace officer may make an arrest in obedience to a warrant delivered to him, or may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.

2. When a person arrested has committed a felony, although not in his presence.

3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

4. On a charge made, upon a reasonable cause, of the commission of a felony by the party arrested.

5. At night, when there is reasonable cause to believe that he has committed a felony. (Enacted 1872.)”

IV.

The Possession of the Appellant Sandez of the Narcotics Involved as Charged in Counts 8, 9 and 10 Need Not Be Personal Possession, Such Possession May Have Been Constructive Possession.

On page 30 of appellant's opening brief and again on pages 34 and 35, the contention is urged that no showing was made that the defendant had possession of the narcotics found, the subject matters of Counts 8 and 9 and also the conspiracy Count 10. The contention is advanced that the last paragraph of Title 21, Section 174, dealing with presumptions requires the showing of personal possession.

This argument overlooks numerous cases decided by this court stating that such possession need not be personal but may be constructive. Before citing such cases we direct attention to the trial court's instructions which properly recognized that possession may be sole or joint or actual or constructive possession. [R. 736.]

This court has recently reannounced this principle in a narcotic case, interpreting the last paragraph of Section 174 of Title 21, stating (p. 297), "Possession is not required for the offenses of which appellant was charged and convicted." And further held that it is not necessary that possession be immediate or exclusive.

Brown v. United States, 222 F. 2d 293, 296 (C. A. 9, 1955).

This court, in the case of *Pon Wing Quong v. United States*, 111 F. 2d 751, p. 754 (C. A. 9, 1940), recognized

that one may be guilty who aids and abets by recognized principles of law of constructive possession (pp. 756-757):

“Anything done to further the concealment by misleading, or in any other manner avoiding the inspectors from discovering the contents thereof would constitute facilitating the concealment.”

And, again in the same case on page 758:

“Possession of the opium as that expression is commonly understood is in neither case a requisite of guilt.”

See also:

Borgfeldt v. United States, 67 F. 2d 967 (C. C. A., 1933).

In the *Borgfeldt* case the court specifically stated that an instruction to the effect that the possession contemplated by the statute must be “personal and exclusive” was *not* correct, and that the Government need not show that the morphine was actually concealed by the defendant (see p. 969).

Another *narcotic* case to the same effect:

United States v. Cohen, 124 F. 2d 164 (C. C. A. 2), cert. den. 315 U. S. 811 (*Bernstein v. United States*).

In the *Cohen* case, four defendants were convicted of concealing and facilitating concealment of morphine. The Court stated, on page 165, as follows:

“The defendants were all convicted upon both counts and each has appealed. Under the first statute we have quoted it was only necessary to show possession of the narcotics to establish guilt and under the second statute, making an abettor a principal, it was not necessary that each of the defendants should have

had the narcotics, but only that one or more of them had possession while the others aided in the illicit transaction to which that possession was incidental. *United States v. Hodorowicz*, 7 Cir., 105 F. 2d 218, 220, certiorari denied 308 U. S. 584, 60 S. Ct. 108, 84 L. Ed. 489; *Vilson v. United States*, 9 Cir., 61 F. 2d 901."

An additional *narcotic* case is:

Mullaney v. United States, 82 F. 2d 638 (C. C. A. 9, 1936).

In the *Mullaney* case on pages 642 and 643, in discussing instructions which are rather similar to the ones given in the instant case, the court pointed out, particularly on page 642, that an instruction requiring that possession must be "personal and exclusive," was not correct.

It should be observed in this case that appellant Sandez interposed not one single objection to the instructions given. [R. 754.]

In view of no objections it should be assumed that the court fully instructed the jury on all the pertinent issues and principles involved. The jury was instructed on the law pertaining to conspiracy. [R. 739, *et seq.*] The pertinent portions of the statute involved, namely, 21 U. S. C. 174 were read to the jury. [R. 731.] The customary general instructions were given as is the custom of this trial judge long experienced in presiding over jury trials. The court advised the jury of the principles of law embodied in Title 18 United States Code, Section 2, namely, the law pertaining to aiding and abetting, another in the commission of a crime. [R. 734-735.]

In light of this record and in light of the fact that from all the facts and circumstances, the admissions made

by the defendant Sandez, declarations made by the co-conspirator Perno during the furtherance of the conspiracy concerning the source of narcotics as being from "Tutu" from Tijuana [R. 60-61], the fact of Sandez's highly inferentially guilty presence at the site of the crime directly contemporaneous with the delivery and acceptance of this large quantity of heroin which was being sold for \$25,000, clearly presents a position justifying the application of the so-called presumptive phase of the last paragraph of Title 21, United States Code, Section 174, dealing with the unexplained possession of such narcotics; despite the fact that the narcotics when found were not on the immediate person of appellant Sandez.

Subsequent to the amendment of 21 U. S. C. 174, while the courts have constantly pointed out the burden of proving guilt never shifts from the accuser, still when the possession of narcotics remains unexplained the courts have steadfastly stated that the burden of explaining such possession is on the accused.

United States v. Chiarelli, et al., 192 F. 2d 528, 531 (C. A. 7, 1951).

This court has considered and held the effect of the presumption above noted as contained in the Jones-Miller Act applying its effect in like cases.

Ferrari v. United States, 169 F. 2d 353 (C. A. 9, 1948).

To similar effect:

Pitta v. United States, 164 F. 2d 601 (C. A. 9, 1947); and

Gonzales v. United States, 162 F. 2d 870 (C. A. 9, 1947).

V.

There Was Sufficient Evidence to Support the Judgment and the Sentence of Guilt as to the Substantive Counts. The Competency of Declarations and Acts of a Confederate Are Not Confined to Prosecutions for Conspiracy.

At several points in appellant's opening brief it is urged that there was insufficient evidence to support the judgment both as to the substantive counts, namely, Counts 8 and 9 and as to Count 10, the conspiracy count. On page 37 of such brief comment is urged that the defendant was shown to not understand the English language by the reason of the testimony of the interpreter Armida Bay. This contention is also urged in other points in appellant's brief concerning the conversations Sandez had when interrogated by Officers Ruskin, Buchanan and Jones.

The answer to such contention concerning appellant's inability to understand or speak English is that such contention was not only urged at trial but the jury weighed such evidence and apparently found to the contrary. It appears to be well established that the credibility of witnesses and the weight of evidence is for the trier of facts and not for the appellate courts to determine.

Such matters are jury questions and the appellate court must assume the jury resolved all conflicts in favor of appellee and must assume the evidence proved all facts which it reasonably tended to prove.

Barone v. United States, 205 F. 2d 909, 912 (C. A. 8, 1953).

Cases following this well established rule that the credibility of witnesses and the weight of the evidence are to

be determined by the trier of the facts are legion. To such effect see:

Goldman v. United States, 245 U. S. 474 (1918);

Gage v. United States, 167 F. 2d 122, 124 (C. A. 9, 1948);

Pasadena Research Lab. v. United States, 169 F. 2d 375, 380 (C. A. 9, 1948);

Butzman v. United States, 205 F. 2d 343, 349 (C. A. 6, 1953) cert. den. 346 U. S. 828;

United States v. Markman, 193 F. 2d 574, 576 (C. A. 2, 1952).

Taking the evidence as a whole not only as it applies to the substantive counts, but also to the conspiracy count the rule is likewise well established that a verdict supported by sufficient evidence is binding on a reviewing court.

United States v. Socony Vacuum Oil Co., Inc., 310 U. S. 150, 254 (C. A. 7); *Glasser v. United States*, 315 U. S. 60, 80 (C. A. 7) as follows:

“It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *United States v. Manton*, 107 F. 2d 834, 839, and cases cited.”

We submit that the evidence which the jury believed not only amply supports, but in fact compels the verdict which the jury returned. The rule as stated in this Circuit is noted in *Stillman v. United States*, 177 F. 2d 607 at p. 616:

“ . . . The jury weighed the evidence and accepted it as true beyond a reasonable doubt, and

since it is supported by sufficient evidence, the verdict binds us. *Hemphill v. United States*, 120 F. 2d 115 (C. A. 9), certiorari denied 314 U. S. 627, 62 S. Ct. 111, 86 L. Ed. 503; *Henderson v. United States*, 143 F. 2d 681 (C. A. 9)."

A. Declarations of Confederates Are Not Confined to Prosecutions for Conspiracy.

It is our view that even under the substantive counts since the heroin there involved is the same heroin excepting as it was later cut, that was found on the night of arrest April 15, that the acts and declarations of Perno made to Agent Katz are the acts of a confederate and are binding on Sandez as to the two substantive counts—Counts 8 and 9.

There is considerable authority applying the law of conspiracy in a criminal action charging only a substantive offense against two or more defendants. One of the earliest cases is *American Fur Co. v. United States*, 2 Pet. 358, 27 U. S. 358, 364, in which case the court stated the rule as follows:

" . . . Where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others. . . ."

United States v. Olweiss, et al. (2 Cir., 1943), L. Hand, 138 F. 2d 798, 799, 800, cert. den. 321 U. S. 744.

"The notion that the competency of the declarations of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admis-

sion does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal."

In *Vilson v. United States*, 61 F. 2d 901 (C. A. 9, 1932), there was no charge of conspiracy alleged in the indictment. However, the court held that there was substantial evidence to show the defendant was engaged in a common conspiracy to do the acts involved. It was further held that even though a conspiracy was not charged, the common object of the associated persons formed a part of the *res gestae* and evidence relating thereto was admissible.

In *Cossack v. United States*, 82 F. 2d 214 at 216 (C. A. 9, 1936), the court held as follows:

"When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while the same is in progress are binding on the others."

As early as 1915, the Court of Appeals for the *Ninth Circuit* in *Belden v. United States*, 223 Fed. 726, at page 730 held:

"It is a common thing to have the question arise whether one defendant is bound by the statements and acts of another, or of persons not even connected by indictment with the offense charged, and the constant ruling has been that, if there has been a joint contrivance, or joint participation, with a common purpose, the acts and statements of the one, while engaged in carrying into effect the common purpose, are evidence against the other, and

this without the necessity of the alleging conspiracy in the commission of the offense.”

To similar effect:

Hitchman Coal & Coke Co. v. Mitchell (1917),
245 U. S. 229, at 249;

Neal v. United States (D. C. Cir., 1950), 185
F. 2d 441, cert. den. 340 U. S. 937;

*Las Vegas Merchant Plumbers Assn. v. United
States*, (9 Cir., 1954), 210 F. 2d 732, p. 751;

Robinson v. United States (9 Cir., 1929), 33
F. 2d 238;

Ladrey v. United States (C. A. D. C., 1946),
155 F. 2d 417;

United States v. Food & Grocery Bureau (S. D.
Cal., 1942), 43 Fed. Supp. 966, 971.

VI.

The Court Did Not Err in Denying Appellant San- dez's Motion for Acquittal at the Close of the Government's Case.

Commencing on page 34 and again on page 41 of appellant's brief it is asserted that a motion of acquittal should have been granted at the close of the government's case. It would appear from the statement of facts adopted from appellant's opening brief and from our herein noted additions, that there was substantial evidence to connect the defendant as a confederate in both the substantive counts, namely, 8 and 9, which pertained to the same heroin as that found in the motel on April 15, 1955 (excepting that the heroin later was cut with sugar of milk and thereby its volume had been increased). It is most likely

to assume from such evidence that there was a conspiracy in operation and that Sandez was a party to same. There is no question but what a crime involving narcotics had been committed prior to the arrest of Sandez and his subsequent admissions, namely, the *corpus delicti* had been established.

In considering a motion for judgment of acquittal the governing rule is 29(a) of the Federal Rules of Criminal Procedure, Title 18. In a recent income tax case decided by this court in considering the rule to be applied when a motion for judgment of acquittal was made the court stated in *Ekwert v. United States*, 231 Fed. 928 (C. A. 9, 1956), as follows (p. 933):

“The trial judge must grant a motion for acquittal where the evidence of guilt is circumstantial only if, as a matter of law, reasonable minds as triers of fact must be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. If, under this test, the case was properly submitted to the jury, its decision will be final. Unlike the practice in some circuits, this court applies no special rule to review circumstantial evidence on appeal. As to circumstantial proof of intent see this court’s *en banc* decision in *McCoy v. United States*, 9 Cir., 169 F. 2d 776, certiorari denied 1948, 335 U. S. 898.”

The trial court was correct in its rulings and is fully supported by the evidence of the case and the governing law. When a motion for a judgment of acquittal is made, the law appears to be that the sole duty of the trial judge is to determine whether substantial evidence, taken in the light most favorable to the government, tends to

show the defendant is guilty beyond a reasonable doubt. *Hemphill v. United States*, 120 F. 2d 115, 117 (C. A. 9), cert. den. 314 U. S. 627; *Mills v. United States*, 194 F. 2d 184 (C. A. 4); *Pritchett v. United States*, 185 F. 2d 438 (C. A., D. C.) 341 U. S. 905; see also, *Gorin v. United States*, 111 F. 2d 712, 721 (C. A. 9), aff'd 312 U. S. 19. No quantity of contradictory evidence will authorize the trial court to direct a verdict if there is sufficient substantial evidence to take the case to the jury.

Ross v. United States, 197 F. 2d 660, 665 (C. A. 6).

The *Curley* case (160 F. 2d 229) is one that is frequently quoted in considering the responsibility of the court when such a motion is made. It is quoted from in *United States v. Schneiderman*, 106 Fed. Supp. 906, 920 (D. C. Cal., 1952), aff'd *Yates v. United States*, 225 F. 2d 146. We quote but a portion therefrom.

“In *Curley v. United States*, D. C. Cir., 1947, 81 U. S. App. D. C., 160 F. 2d 229, 232, certiorari denied, 1947, 331 U. S. 837, 67 S. Ct. 1511, 91 L. Ed. 1850, the court states: ‘The true rule * * * is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt.’ ”

VII.

In View of the Record, the Motions Made or the Absence Thereof, No Error Existed in the Jury's Consideration of the Statements Made by the Co-defendant Flores.

On pages 38 and 39 of appellant's opening brief he contends that error occurred in permitting the jury to consider the statements Flores made subsequent to his arrest. The contention is urged that a motion was made with respect to such statements. The admission, or statements, made by co-defendant Flores have been summarized on pages 14 and 15 of appellant's opening brief.

All of such statements were unquestionably admissible against the defendant Flores as admissions and were properly received for that purpose. As we view the record no effort was made at trial to limit the application of these statements some of which are, of course, hearsay, as to appellant Sandez.

It is true that at the close of the government's case the court granted the motion made by the government. [R. 483 and 541.]

The defendant was represented at trial by an able lawyer, Paul Angelillio. As we view the record, commencing with page 530 thereof, counsel for appellant Sandez argued a motion for judgment of acquittal. This motion is to be noted at Reporter's Transcript 530 to 540. The argument was predicated primarily on the proposition that the government had failed to make a *prima facie* case as to the defendant Sandez. The court was not

specifically requested to limit the statements given by Flores to be applied solely to Flores. It is respectfully submitted that had counsel specifically urged such limitation it is likely to assume that the trial court would have limited such evidence. Counsel for the defendant Sandez apparently felt that to have had repeated to the jury the testimony of Flores that is now contended should have been received solely as to Flores and not against Sandez, would have magnified the probable damaging effect of such statements.

It may be that counsel preferred to have some of such statements remain in the record. By way of illustration attention is invited to the testimony of Officer Ruskin who had testified that during one of the conversations Flores had freed Sandez of any blame concerning the narcotics. The question and answer given is as follows:

“A. I asked defendant Flores if he wanted to help himself, and if he wanted to give us the correct information.

And he stated, ‘Well,’ he says, ‘I brought it up myself for the \$100, and this other fellow, Sandez, didn’t know anything about it.’” [R. 366.]

A further illustration of an answer testified to by Officer Ruskin that counsel for Sandez may have deemed to have been helpful to the defense is the one where Officer Ruskin is relating the conversation he had with Flores subsequently to the arrest of Flores. It is as follows:

“A. Flores stated to me that he did not pick up the narcotics in Mexico, that he picked up the narcotics in San Diego, and that in San Diego he met defendant Sandez, and that Sandez just gave him the ride up there because he had nothing else to do.” [R. 367.]

This last mentioned answer would have had a tendency to free Sandez from any criminal implication.

During the cross-examination of Officer Jones, Attorney Swafford cross-examined Officer Jones concerning a visit Jones had made at the County Jail where he had interrogated defendant Flores. [R. 227-229.]

During this cross-examination Officer Jones had testified that Flores had told him that Flores was known as "Tutu." Counsel representing the defendant Sandez was content to permit this testimony to remain in the record without making any objections although it was apparent this statement made by Flores had been made out of the presence of Sandez.

We have searched the record and have been unable to find any place where specific effort was made to limit the testimony of statements made by Flores out of the presence of Sandez to be applied solely as to Flores. It may be that it will be urged that the argument on the motion for a judgment of acquittal did by implication raise these points. However, even though such contention may have not been specifically brought to the attention of the trial judge, as we understand the law to require, still we believe the court's instructions covered this problem and protected the defendant Sandez from the effect of any possible hearsay statements that Flores may have made. The court instructed the jury with regard to admissions subsequent to the arrest as follows:

"Any statement or admission made by a person after his arrest must be considered as having been made after a criminal conspiracy has been ended and any such statement or admission may be considered by you only in connection with the guilt or innocence of that person." [R. 742.]

The court specifically referred to admissions made outside of court by other members of the alleged conspiracy and instructed as follows:

“You may not use any admission made outside of court by other members of the alleged conspiracy for purposes of determining whether a particular defendant was a member of an unlawful conspiracy unless that defendant was present when the statement was made and so conducted himself as to signify agreement with the statements or declarations. If you conclude, however, from other evidence that a particular defendant was a member of an unlawful conspiracy, you may then consider as if made by that defendant any statements or declarations of other members of such conspiracy, provided such statements were made during the existence of the conspiracy and in furtherance of an object or purpose of the particular conspiracy.” [R. 744.]

The court specifically instructed as to the effects of acts or declarations of an alleged conspirator as is to be noted at Reporter’s Transcript 743, line 19.

It would therefore appear that the trial court’s attention was not properly directed to the hearsay statements made by Flores that are now complained about for the first time on appeal.

The receipt of hearsay evidence without objection cannot be raised for the first time on appeal.

United States v. Fleming, 134 F. 2d 776 (C. A. 2), 1943;

Trice v. United States, 211 F. 2d 513, 519 (C. A. 9), 1954;

To similar effect *re* a motion to strike:

United States v. Smolin, 182 F. 2d 782, 786 (C. A. 2), 1950.

VIII.

The Court Did Not Err in Omitting to Instruct the Jury That Oral Conversations or Admissions Were to Be Received With Caution.

On page 40 of appellant's brief he asserts that the court was under a duty to instruct the jury that oral admissions of Sandez were to be received with caution. It is to be noted that after the court had concluded with his instructions no objections were imposed by Sandez to the instructions given. [R. 754.] It is well established by the Federal Rules of Criminal Procedure, Rule 30, Title 18, that no party may assign as error any portions of the charge or omissions therefrom unless he objects to the instructions given. Thus, we see for the first time on appeal an objection is now being made to an alleged omission to give an instruction that the appellant contends should have been given. The court did instruct the jury concerning the effect of admissions made by a person after his arrest [R. 742] and as to the effect of admissions made outside of court for the purpose of determining whether a particular person was a member of an unlawful conspiracy. [R. 744.]

It is significant to note that after the court had given his instructions counsel representing the defendant Flores **proposed a supplemental instruction** which the court gave. [R. 758.] This dealt with the statute relating to the possession of narcotics and pertained to the unexplained possession thereof. [R. 758-759.] It is apparent from the foregoing that not only did the defendant Sandez at trial waive any right to object to omissions in the instructions, but that furthermore the logical conclusion is that if the court had then been requested he

would have given a cautionary instruction to the effect that admissions made by a defendant were to be received with caution.

The following discussion will concern itself with similar matters where the court either refused to give or where the court omitted to give instructions, as being held not error in the absence of calling such requests to the trial court's attention.

A failure to give an instruction that an oral confession made by a defendant to a police officer should be regarded with caution did not constitute reversible error where there had been no request for such instruction and the omission thereof did not effect defendant's substantial rights.

Obery v. United States, 217 F. 2d 860 (C. A., D. C., 1954).

A failure to ask for additional instructions should not be raised for the first time on appeal.

Cosenza v. United States, 195 F. 2d 177 (C. A. 9, 1952).

To similar effect,

United States v. Stephenson, 110 Fed. Supp. 623 (D. C. Alaska, 1953).

In the last mentioned case complaint was made that a cautionary instruction should have been given as to the effect of the testimony of an accomplice.

While it is deemed better practice to give an instruction against placing too much reliance upon the testimony of an accomplice, still the absence of giving such an in-

struction has been held to be not error. *United States v. Caminetti*, 242 U. S. 470, 495. Like effect as to a narcotic case:

Mullaney v. United States, 82 F. 2d 638 (C. A. 9, 1936).

This circuit recently reaffirmed such rule with respect to the testimony of an accomplice. *Papadakis v. United States*, 208 F. 2d 945 at p. 954 (C. A. 9, 1953). Even a failure to define reasonable doubt has been held to not be a deprivation of due process. *United States v. Jonikas*, 197 F. 2d 675 at p. 679 (C. A. 7, 1952). A failure to charge the jury that an information is merely an accusation, of the presumption of innocence, of the testimony of an accomplice has been held not to constitute a fatal defect in the absence of request for such instructions.

United States v. Capital Meats Co., 166 F. 2d 537 (C. A. 2), cert. den. 334 U. S. 812.

Additional cases illustrating that as a general rule there must be a request as is contemplated by Rule 30 of the Federal Rules of Criminal Procedure are, among others, the following:

Kobey v. United States, 208 F. 2d 583, 597 (C. A. 9, 1953);

Brown v. United States, 222 F. 2d 293, 298 (C. A. 9, 1955);

Mitchell v. United States, 213 F. 2d 951, 957 (C. A. 9, 1954);

Pereira v. United States, 202 F. 2d 830, 835-836 (C. A. 5, 1953), aff'd 347 U. S. 1.

IX.

The Evidence Was Sufficient to Support the Verdict of Guilty as to Appellant Sandez to Count 10, the Conspiracy Charge.

Commencing on page 41 of appellant's opening brief, he contends the evidence was insufficient to hold the defendant Sandez as a co-conspirator and on page 43 contends that there was insufficient evidence to show the existence of the *corpus delicti* of the conspiracy count.

It is not our intent to repeat the evidence which we feel justified the jury's conclusion that Sandez was a co-conspirator, an inference which was fully justified by all the facts and circumstances and was admitted by statements made subsequent to his arrest. So far as the *corpus delicti* is concerned, unquestionably there was adequate evidence to illustrate that a conspiracy was in operation, namely, an unlawful conspiracy to deal in heroin. Nothing more need occur to establish the *corpus delicti* than the fact of the unlawful agreement. Hence, when such *corpus delicti* had been abundantly established, admissions made by Sandez were properly receivable. It was noted in *Shibley v. United States*, F. 2d (C. A. 9, Mar. 1955) under footnote (10) "The conspiracy is the crime, and that is one, however diverse its objects. *Frohwerk v. United States*, 249 U. S. 204, 210. See *Nye & Nissen v. United States*, 9 Cir., 168 F. 2d 846, 850, aff'd 336 U. S. 613."

The court quite properly instructed the jury pertaining to the law governing the consideration as to whether or not a conspiracy existed. His instructions on this subject commenced on [R. 739]. This court has repeatedly announced the rules that govern in considering whether a conspiracy exists and as to the effect of an act or decla-

ration of a co-conspirator in furtherance thereof and made while such conspiracy is in operation.

A narcotic case with some similarity to the instant case is *Penosi v. United States*, 206 F. 2d 529 (C. A. 9, 1953) which case illustrates what facts are sufficient to infer that an individual was a party to the conspiracy, pointing out that it is immaterial whether the evidence be direct or circumstantial. Volumes have been written upon the subject matter of what may be considered in connection with whether or not a criminal conspiracy is in operation and whether any given person was or was not a co-conspirator. We shall confine our comments to but a few cases on this subject.

The law of conspiracy, by the very nature of such an unlawful venture, usually covertly planned, is one which allows great latitude in drawing proper inferences from direct and circumstantial evidence to show the existence of the conspiracy. It is well settled that:

“Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a development and collocation of circumstances.”

Glasser v. United States, 315 U. S. 60, 80.

To the same effect:

United States v. Manton, 107 F. 2d 834, 839 (C. A. 2); and

Curley v. United States, 160 F. 2d 229, 236 (C. A., D. C.).

An often quoted case, in support of this principle, and one which contains a concise statement of many of the important principles involved in the law of conspiracy

is the Ninth Circuit case of *Marino v. United States*, 91 F. 2d 691 (C. A. 9), cert. den. 302 U. S. 764.

Not only is it well settled that a conspiracy may be proven by circumstantial evidence, but also that it should not be judged by dismembering it and viewing its separate parts, but only by looking at the evidence as a whole, in its entirety. In *Carlson, et al. v. United States*, 187 F. 2d 366, 371 (C. A. 10), the following was stated:

“ . . . As has been stated, ‘ . . . the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.’ ”

A conspiracy is a secret, furtive crime and by its very nature must usually be proved by circumstantial evidence.

Ryan v. United States, 99 F. 2d 864 (C. A. 8), reh. den. 306 U. S. 668;

Rose v. United States, 149 F. 2d 755 (C. A. 9).

“ . . . Ordinarily, only the results of a conspiracy, and not the private plotting and promoting, are observed.” *Rose v. United States, supra*, p. 759.

“ . . . But, proof of a conspiracy, by its very nature must be circumstantial, and the step between innocent knowledge and guilty intent and agreement may be, and is usually shown by prolonged and interested cooperation, indicating a ‘stake in the venture.’ ” *Van Huss v. United States*, 197 F. 2d 120, 121 (C. A. 10).

It is, of course, elementary that every act or declaration of each member of a conspiracy in furtherance thereof

and while the conspiracy is in operation is considered the act and declaration of each member of a conspiracy.

Barnett v. United States, 171 F. 2d 721 (C. A. 9, 1949).

This being the rule the declarations made by Vince Perno to Agent Katz when Agent Katz was negotiating to buy a quantity of heroin for \$25,000 and where Perno referred to his source as being "Tutu" in Tijuana was a declaration made in furtherance of the conspiracy. [R. 60-61.] Such declaration had a tendency to have led the prospective buyer, had he been one who was illegally dealing in narcotics rather than a government agent, to have had more reliance on the ability of Perno to supply such narcotics and should properly be interpreted as being in the furtherance of the conspiracy and hence binding upon Sandez.

The doctor's business card found upon Sandez [Ex. 30] with Golden Elliott's phone number written in reverse fashion was in confirmation and of itself a document from which guilty knowledge could be inferred when taken in conjunction with the previous contacts had between Perno and Agent Katz and the activities of Brown, Greer and Perno on the date of the arrest, namely, April 15, 1955. This card similar to the piece of paper taken from the pocket of a co-conspirator which bore a telephone number of a prune pitter when arrested has a striking similarity and are grounds to infer that the carrying of such telephone number was a result of complicity in the conspiracy charged and then in operation. The case of the telephone number of the prune pitter where the charge pertained to possessing an illegal still and conspiracy to commit such an offense is *United States v. Heitner*, 149 F. 2d 105 (C. A. 2, 1945).

A person may be found guilty as a party committing a substantive offense and likewise as to conspiring to violate the laws against dealing in narcotics.

Carrado v. United States, 210 F. 2d 712 (C. A., D. C., 1953).

Proof of active membership during the entire alleged life of a conspiracy is not required to sustain a conviction of guilt. Such is the rule announced in the narcotic case *United States v. Markman*, 193 F. 2d 574 (C. A. 2, 1952). The *Markman* case likewise discusses the effect of admissions and the corroboration needed which subject has been treated at another point in this brief. In discussing such rule of the corroboration needed the court states:

“The purpose of the rule requiring corroborative testimony is only to guard against convictions based upon an untrue confession. *Warszower v. United States*, *supra*, 312 U. S. at page 347, 61 S. Ct. 603. Its function is not so much to give evidence of the defendant’s guilt as to supplement his confession to that effect. *United States v. Kertess*, 2 Cir., 139 F. 2d 923, certiorari denied *Kertess v. United States*, 321 U. S. 795.” (P. 576.)

(a) There Was Sufficient Proof Aliunde to Establish Appellants Connection With the Existing Conspiracy.

Commencing on page 42 of appellant’s opening brief reference is had to the *Glasser* (315 U. S. 60) and *Schneiderman* (106 Fed. Supp. 892) cases; both of which authorities the government contends support its position.

The argument advanced is that : (1) Statements of a purported co-conspirator (Perno) cannot be used to establish the existence of the conspiracy nor appellant’s con-

nection to it; (2) The statements of a purported co-conspirator (Flores) made after the termination of the conspiracy cannot be used to establish the existence of a conspiracy, nor appellant's connection with it.

To the second, or last referred to contention, we are in agreement; however, appellant apparently confuses the language of the *Glasser* and *Schniederman* opinions.

It must be borne in mind that even the *Glasser* opinion in referring to declarations made by a co-conspirator out of the presence of an alleged co-conspirator adds this vital observation (p. 74):

“ . . . , only if there is proof aliunde that he is connected with the conspiracy.”

There is nothing in either of these opinions that demands that the proof of the existence of a conspiracy in operation must precede the date of the declaration of an alleged co-conspirator. Indeed, in the instant case, the existence of the conspiracy, the unlawful agreement, or the *corpus delicti*, was substantially established directly and circumstantially by the testimony of Agent Katz concerning his dealing with Perno, of the complicity of the co-conspirators Greer and Brown and their observed activities on April 15, the date of the arrest.

Evidence *aliunde* of appellants Sandez (and likewise his friend Flores) connection could well be inferred from the fact of their close presence to the motel where the narcotics were being sold at the very hour, or minute of such transaction coupled with the suspicious conduct of Sandez as then observed by Officers Ruskin and Buchanan.

The language of the *Schneiderman* case, *supra*, is appropriate (p. 901):

“A conspiracy, like any other crime, can only be established by the various external manifestations of the parties—the acts and conduct and declarations or statements of third persons, taken together with the acts and conduct and declarations or statements of the defendants. *Garhart v. United States*, 10 Cir., 1946, 157 F. 2d 777, 780-781. This does not mean that the existence of the conspiracy may be proved solely by the declarations or statements of the defendants themselves, for these might fall into the field of extra-judicial admissions and so require corroboration. Since conspiracy is the criminal offense charged, there must be some corroborating evidence of the existence of this *corpus delicti aliunde* the extra-judicial statements or declarations of the accused.”

Judge Mathes in the *Schneiderman* case, alike the justification Judge Yankwich was entitled to arrive at in the instant case concluded (p. 901):

“. . . for there is abundant evidence *aliunde* declarations of the accused which, if believed, would be sufficient to show the existence of the conspiracy.”

ORDER OF PROOF. It is especially the rule of law in conspiracy trials, or trials involving confederates, that the order of proof is a matter wholly within the discretion of the trial court. *Bartlett v. United States*, 166 F. 2d 920, 925 (C. A. 10, 1948). In the *Bartlett* opinion the following appropriate language is noted (p. 925):

“While the declarations of one alleged co-conspirator are not admissible against another co-conspirator, unless the existence of the conspiracy is established by other evidence, the declarations of

each co-conspirator are admissible as against him, and the whole evidence may be considered in determining whether a conspiracy has been established. In other words, when the independent evidence, together with the acts and declarations of one conspirator, established the conspiracy, and the independent evidence, together with the acts and declarations of the other conspirator, establish the conspiracy, the declarations of each co-conspirator, made during the pendency of the conspiracy and in furtherance of its object, are admissible against both."

To like effect *re* order of proof:

Briggs v. United States, 176 F. 2d 317 (C. A. 10, 1949).

It is noted in a recent narcotic conspiracy case, *United States v. Sansone*, 231 F. 2d 887, 893 (C. A. 2, 1956), a discussion of the settled principles applying to the acts and declarations of co-conspirators after which observations the court states (p. 893):

"Nor does it make any difference that when the evidence concerning the sale of July 3 was introduced, the prosecution had not yet proved appellant's connection with the conspiracy. The order in which evidence is received is within the discretion of the trial court."

The *Sansone* case is of additional interest in connection with the instant case, for alike here, in the *Sansone* case, a card with a telephone number on it was obtained by the arresting officer, and was introduced into evidence. A motion to suppress such card was denied on the grounds of being untimely.

In concluding this subject and the consideration to be given to the part played by each conspirator the following language is appropriate:

“Phelps v. United States, 160 F. 2d 858, 867, 868 (C. A. 8):

“Once there is satisfactory proof that a conspiracy has been formed, the question of a particular defendant’s connection with it may be merely a matter of whether the stick fits so naturally into position in the fagot as to convince that it is a part of it. It is therefore possible for the circumstances on an individual defendants participation in an established conspiracy to become substantial from their weight in position and context, though in abstraction they may seem only slight. . . .”

An illustration of an unknown party who may be considered a co-conspirator and whose acts were binding on named defendants is the case involving the “tail car,” *United States v. Harrison*, 121 F. 2d 930, 934 (C. A. 3):

“Finally, the appellant protests the admission by the truck driver concerning the ‘tail’ car and the warning given by its occupants that the truck was being followed. The trial judge’s remark that ‘I think the jury is entitled to infer that they were co-conspirators from their actions’ is claimed to be prejudicial. Like the evidence of the failure to report the sugar sale, the testimony about the ‘tail’ car was circumstantial evidence of the common design. That these unknown parties were co-conspirators might, of course, be inferred from the circumstances and did not have to be directly proved. Unknown conspirators may be indicted along with named conspirators. The acts of any co-conspirator are admissible against all even when the actors are not indicted, and even though the accused was not present.”

Conclusion.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

LOUIS LEE ABBOTT,

Assistant U. S. Attorney,

Chief, Criminal Division,

NORMAN W. NEUKOM,

Assistant U. S. Attorney,

Chief Trial Attorney.

Attorneys for Appellee.

APPENDIX.

In the United States District Court, Southern District of California, Central Division.

United States of America, plaintiff, vs., Howard Vincent Perno, Robert Brown, Frank Willie Greer, Jr., Juan Jose Flores, Salomon Rodrigo Sandez, Jr., Golden Esther Elliott, and Eddie Sonneli, Defendants. No. 24,255-Criminal.

Honorable Leon R. Yankwich, Judge Presiding.

APPEARANCES:

For the Plaintiff:	LAUGHLIN E. WATERS, Esq. United States Attorney By JAMES R. DOOLEY, Esq. Assistant United States Attorney
For the Defendant:	PAUL MAGASIN, Esq. and
Howard Vincent Perno:	LEO K. GOLD, Esq. 300 South Beverly Drive, Suite 209 Beverly Hills, California.
For the Defendant:	ROLAND WILSON, Esq.
Robert Brown:	565 West 5th Street San Pedro, California.
For the Defendant:	HERMAN A. ENGLISH, Esq.
Frank Willie Greer, Jr.:	By THEODORE J. ELIAS, Esq. 1570 East 103rd Street Los Angeles, California.
For the Defendant:	THEODORE J. ELIAS, Esq.
Juan Jose Flores:	416 West 8th Street, Room 1212 Los Angeles, California.

For the Defendant:	PAUL ANGELILLO, Esq.
Salomon Rodrigo	408 South Spring Street,
Sandez, Jr.:	Room 205
	Los Angeles, California.
For the Defendant:	MAX BAMBERGER, Esq.
Golden Esther Elliott:	650 South Grand Avenue,
	Room 914
	Los Angeles, California

ALSO PRESENT:

Armida Bay, Spanish Interpreter.

Los Angeles, California, Monday, May 23, 1955. 10:00
A. M.

(Other cases called.)

The Court: Now, I think we had better take up the criminal matter, gentlemen, because these other matters may take a little time.

Let's take up the criminal matter, gentlemen, United States against Perno, and others.

The Clerk: Case 24,255, United States against Howard Vincent Perno, Robert Brown, Frank Willie Greer, Jr., Juan Jose Flores, Salomon Rodrigo Sandez, Jr., Golden Esther Elliott.

The Court: And there is one other.

The Clerk: And Eddie Sonneli.

The Court: All right. Which one is Eddie Sonneli? Is he here?

The Clerk: I understand he is a fugitive.

The Court: A fugitive. Now, gentlemen, this matter is up here for plea. As I understand it, they did not plead in Judge Hall's court, and will plead here.

The Clerk: Are those your true names, as called, all of you?

Defendants: Yes, sir.

The Clerk: Now, I have attorney Roland Wilson represents Robert Brown. Is that right?

Mr. Wilson: That is correct.

The Clerk: And Leo K. Gold represents Perno?

Mr. Magasin: And I also, Paul Magasin, on behalf of Perno.

The Clerk: And who?

Mr. Magasin: Paul Magasin, M-a-g-a-s-i-n.

The Clerk: Herman English represents Frank W. Greer, Jr.?

Mr. Elias: May I say about that that Mr. English was required to be in another court. I am representing another defendant, and he asked me to appear for Mr. Greer for the purpose of entering a not guilty plea.

The Clerk: What is your name, please?

Mr. Elias: My name is Theodore Elias.

The Clerk: And you are representing another defendant here? You represent Mr. Flores?

Mr. Elias: That is correct.

The Clerk: And Paul Angelillo for Sandez?

Mr. Angelillo: That is right.

The Clerk: Counsel, do each of you have a copy of the indictment?

Mr. Magasin: I, on behalf of Mr. Perno, waive reading it.

The Clerk: Waive reading of the indictment?

Mr. Angelillo: Waive the reading for Sandez.

Mr. Elias: Waive the reading on behalf of Greer and Flores.

Mr. Wilson: Waive on behalf of Brown.

Mr. Bamberger: Waive reading on behalf of the defendant Golden Esther Elliott.

The Clerk: All right. Do you have Perno here? I will take Perno first.

The Court: All right.

The Clerk: Mr. Perno, what is your plea to Count 1 of the indictment?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 2?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 3?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 4?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 5?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 6?

Defendant Perno: Not guilty.

The Clerk: What is your plea to Count 10?

Defendant Perno: Not guilty.

The Clerk: Mr. Brown, Robert Brown, what is your plea to Count 4 of the indictment?

Defendant Brown: Not guilty.

The Clerk: And what is your plea to Count 10?

Defendant Brown: Not guilty.

The Clerk: Frank Willie Greer, Jr., what is your plea to Count 4 of the indictment?

Defendant Greer: Not guilty.

The Clerk: And what is your plea to Count 10?

Defendant Greer: Not guilty.

The Clerk: Juan Jose Flores, what is your plea to Count 8 of the indictment?

Mr. Wilson: Wait a minute.

(Thereupon the interpreter came forward.)

The Court: Was the interpreter also in Judge Hall's court?

Mr. Wilson: Yes, in Judge Hall's court.

The Court: We just want to make sure. All right.

Defendant Flores (Through interpreter): Not guilty.

The Clerk: What is your plea to Count 9?

Defendant Flores (Through interpreter): Not guilty.

The Clerk: What is your plea to Count 10?

Defendant Flores (Through interpreter): Not guilty.

The Clerk: Salomon Rodrigo Sandez, Jr., what is your plea to Count 8 of the indictment?

Mr. Angelillo: We will use the interpreter again for this defendant.

The Court: All right.

Defendant Sandez (Through interpreter): Not guilty.

The Clerk: What is your plea to Count 9?

Defendant Sandez (Through interpreter): Not guilty.

The Clerk: And what is your plea to Count 10 of the indictment?

Defendant Sandez (Through interpreter): Not guilty.

The Clerk: Golden Esther Elliott, what is your plea to Count 7 of the indictment?

Defendant Elliott: Not guilty.

The Clerk: And what is your plea as to Count 10?

Defendant Elliott: Not guilty.

The Clerk: That is all of them, your Honor. Eddie Sonnelly is a fugitive.

The Court: All right. Gentlemen, the case was sent over here with the understanding that we have a plea entered, and that I find a trial date. I told Judge Hall that I would determine whether I can try it, or someone else. There is no particular judge available at the present time.

How long will this case take? I gather all of these matters arose out of the same series of transactions?

Mr. Magasin: Yes, I think that is correct.

The Court: What was the maximum estimate for the Government?

Mr. Magasin: The United States Attorney's Office is not represented here at the moment, if your Honor please. The assistant or deputy who was in court is not here now.

The Court: Well, he should be here. We can't go on without him. I could go on with the arraignment and plea, but somebody should have called my attention to that.

Mr. Angelillo: I think an estimate was made as to a week or ten days. Is that correct, Mr. Magasin?

Mr. Magasin: I am not certain who made that estimate, but somebody did. I am not aware who made that estimate.

The Court: Supposing we continue it to next Monday for setting. Before we do that, however, you ought to get the United States Attorney in here.

Mr. Dooley: Your Honor, I will go up and see who has the case.

The Clerk: It shows Bruce Bevan on this calendar.

The Court: Well, let the record show that you were present, Mr. Dooley, and you have been here for the purpose of the arraignment and plea.

Mr. Dooley: Yes, your Honor.

Mr. Magasin: Your Honor, there is something here: The defendant Perno tells me that he is about to be operated on. He is in the County Jail, and he has a wound in his lung, and he is expecting to have surgery in about a week, so it may be—I wanted to call that to the attention of the court, in view of other counsel representing other defendants here. There is no exact time as to when he will be free. He just called this to my attention at this moment.

The Court: Supposing we continue the matter, then, for a week, gentlemen. As I told you before, I could give you a date in the middle of June, to try this case, and I could take it on on any Tuesday, either the 14th or the 21st of June. It is better to start it earlier. Of course, if he is waiting his turn, you cannot tell. You may not be able to tell when they will be able to get around to it. The difficulty about the last week in June is that we have obligatory attendance at the Judicial Conference. However, if we set it now for the 14th of June, we have got two weeks in which to dispose of it, two full weeks, and if the matter is not of an urgency, that will put him in the position to forego the operation, unless the doctor will send up a certificate saying that he is not in a position to go on with the trial.

Mr. Magasin: Your Honor, he has just really told me now about it, and, of course, he is not medically acquainted with the situation, but I wanted the court to have the information I do have, and he says it is of an emergency

nature, but we will procure actual medical advice for the court between now and the next hearing.

The Court: Suppose we set it for trial on the 14th. Then if it appears that he cannot be present, then the question for us to determine will be whether we can go on as to the other defendants. Of course, many of the defendants are named as to some of the counts only. I assume they are all named in the conspiracy count.

The defendants are in custody, and it is our desire to give quick trial. That is the reason why Judge Hall called me off the bench, and told me about this.

Suppose we set it for trial then, for Tuesday, June the 14th, and then if the condition of this defendant is such that he must have this surgery and cannot be present, then, of course, you will inform the court and make the motion.

Mr. Magasin: I will inform the court accurately as soon as I obtain the information, and I think we can obtain the information.

The Court: Are you willing to take the responsibility, Mr. Dooley, of representing your office?

Mr. Dooley: Yes, your Honor. I would like to get the number of this.

The Clerk: 24254.

The Court: I think Judge Hall informed counsel that he would try to get somebody to try it as quickly as possible because of the fact that many of the defendants are in jail and cannot make bond.

Then if any unusual circumstance develops, you may let me know.

You may remove the prisoners, gentlemen, without waiting for the court to adjourn.

CERTIFICATE.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 6th day of June, A. D. 1956.

MARIE G. ZELNER,
Official Reporter.

No. 15016

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SALOMON R. SANDEZ, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING.

LAUGHLIN E. WATERS,

United States Attorney,

LOUIS LEE ABBOTT,

Chief, Criminal Division,

Assistant U. S. Attorney,

NORMAN W. NEUKOM,

Chief Trial Attorney,

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FILED

JAN 26 1957

PAUL P. O'BRIEN, CLERK

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No. 15006
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

SALOMON R. SANDEL, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA.

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

PETITION FOR REHEARING.

*To the Honorable Dal M. Lomenzo, James Alger Foe, and
Stanley N. Barnes:*

The appellee hereby petitions this Honorable Court for a rehearing of the within appeal, the judgment on appeal herein having been dated November 28, 1956, and an extension of time for filing of this petition having been granted to January 26, 1957.

**The Language of the Opinion May Be Misinterpreted
as a Repudiation of a Well-Established Principle.**

It is our firm belief that this Court did not intend to repudiate the established principle that under proper circumstances the acts and declarations of a confederate are

competent evidence in a crime charging a substantive offense, when such offense is participated in by two or more persons and the act or declaration is shown to be that of a participating confederate. This principle we respectfully request the Court to discuss.

Preliminary Statement.

This Court has affirmed the conviction of Appellant Sandez as to Count 10, the conspiracy count. This Court has reversed the conviction of Sandez, charged with two substantive counts, namely, Count 8, relating to importation, and Count 9, relating to transportation of narcotics. This Court has, among other things, in its opinion probably quite properly held that under the facts of this case there was not sufficient corroboration of the admissions made by Sandez to corroborate the substantive counts.

Discussion and Argument.

In this petition for rehearing we are not challenging the reversal had of the two substantive counts, *i. e.*, Counts 8 and 9; but we are asking that clarification be had so that the language of this opinion may not be construed as a repudiation of the established principle of law that under proper circumstances a declaration and acts of a confederate are applicable in proof of a substantive count, and that such principle is not confined to prosecutions for conspiracy.

In the slip opinion of this Court, on page 11 thereof, the following is noted:

“Conversation Number 1, made by a conspirator during the course of the conspiracy would be binding on Sandez insofar as Count 10 is concerned. *but not as to the substantive counts.*” (Emphasis ours.)

The opinion further refers to this subject in the first full paragraph on page 18 of the *slip* opinion, the last page.

The conversation there referred to is designated on page 8 of the opinion as "Conversation Number 1." This is the conversation that occurred on the morning of April 13, 1955, in a room of the Constance Hotel in Pasadena, California. It pertained to a conversation between the co-conspirator Perno, and the narcotic agent, the witness Katz.

It is to be observed that the defendant Perno was not named as a defendant in the substantive counts 8 and 9. It is our view that, despite the fact that he was not so named as a defendant therein, still his act and declaration then and there made could be binding as an act or declaration of one of the parties in reference to a common criminal object, where as here, two or more persons are associated together for the same illegal purpose.

It is, however, also our view that at this case was tried, namely, by an oversight or omission on the part of the prosecutor to specifically call the Court's attention to the theory of the Government's case in connection with this declaration of Perno, and to submit to the Court appropriate instructions which clearly presented to the jury the principle of law that declarations of a confederate are not confined to prosecutions for conspiracy alone, that the reversal on these counts was proper, and that under such circumstances the conversation designated as "Conversation Number 1" should not be construed to bolster the evidence as to the substantive counts that this Court has recently reversed.

It appears, however, that since this Court and other Federal Courts have for years applied the rule that the declarations of a confederate, or one found to be occupying a position similar to a co-conspirator, are properly admissible against another where the charge is only that of a substantive offense, we suggest that if this Court deems it proper to grant this petition for a rehearing the language of the opinion be clarified so that it will not be construed as a repudiation of this rule.

The rule, as we understand it, has been succinctly stated as:

“The notion that the competency of the declaration of a confederate is confined to prosecutions for conspiracy has not the slightest basis; their admission does not depend upon the indictment, but is merely an incident of the general principle of agency that the acts of any agent, within the scope of his authority, are competent against his principal.”

United States v. Olweiss (2 Cir. 1943), 138 F. 2d 798, 799, 800, cert. den. 321 U. S. 744.

Or, as otherwise stated, it seems to be generally held that a conspiracy may be shown, so as to render admissible evidence of the acts or statements of a confederate or co-conspirator, although no conspiracy is charged in the indictment.

In our initial “Appellee’s Brief” commencing on page 34 we have collected a group of cases which we feel supports this proposition under the sub-heading:

“A. Declarations of Confederates are not Confined to Prosecutions for Conspiracy.”

Without repeating the authorities there noted, and with the desire to not unduly burden this petition, it is never-

theless thought helpful to submit the following discussion and authorities concerning this proposition: 11 *American Jurisprudence*, p. 568; *Conspiracy*, Sec. 37.

“ . . . The rule seems to be well established that, upon the trial of an indictment for a crime, evidence is admissible to prove a conspiracy to commit the crime charged, although the conspiracy is not charged in the indictment. This is permitted not for the purpose of allowing a conviction for a crime not specifically charged, but merely to show the intent with which the parties acted.¹¹ Furthermore, it has been held that the crime contemplated by the conspiracy need not be the identical offense charged in the indictment or even a similar one, if the offense charged in the indictment is one which might have been contemplated as a result of the conspiracy.¹²

“Evidence of a conspiracy between the defendant and other persons has been held to be admissible although the other conspirators are not joined in the indictment or information and no conspiracy is charged therein.¹³ Consequently, since evidence to show a conspiracy to commit the crime charged in an information may be admitted without any averment of conspiracy, an allegation in an information for robbery to the effect that the defendant entered into a conspiracy with certain named persons for the commission of the offense may be treated as surplusage and evidence may be introduced showing a conspiracy between the defendant and persons other than those named in the information.¹⁴”

¹¹Citing various state cases.

¹²Annotation: 66 A. L. R. 1312.

¹³Annotation: 66 A. L. R. 1312.

¹⁴Annotation: 66 A. L. R. 1313.

We also invite attention to a discussion of this subject contained in 66 *A. L. R.* 1311: *Annotation*. Instruction on evidence as to conspiracy where there is no charge of conspiracy in indictment or information, page 1312.

“Evidence of a conspiracy between the defendant and other persons has been held to be admissible, although the other conspirators are not joined in the indictment or information, and no conspiracy is charged therein. *State v. Ruck* (1906), 194 Mo. 416, 92 S. W. 706, 5 Ann. Cas. 976 (assault with intent to kill); *State v. Kennedy* (1903), 177 Mo. 98, 75 S. W. 979 (murder); *State v. Sykes* (1905), 191 Mo. 62, 89 S. W. 851 (rape); And see *Gill v. State* (1894), 59 Ark. 422, 27 S. W. 598, *infra*. But see *Taylor v. Com.* (1906), 28 Ky. L. Rep. 819, 90 S. W. 581, *infra*, III.”

And at 1313:

“It is generally held that a conspiracy may be shown, so as to render admissible evidence of the acts or statements of the defendant’s co-conspirators, although no conspiracy is charged in the indictment or information. (Citing cases.)”

The rule as here discussed has been cited in various civil and criminal cases since the date of its rendition, and various reasons have been given for it. Some base it on conspiracy, even though not alleged, others base it on the principle of *res gestae*, and still others on agency or partnership.

In *Hitchman Coal & Coke Co. v. Mitchell* (1917), 245 U. S. 229, at 249:

“. . . In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that

there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves. The rule of evidence is commonly applied in criminal cases, but is of general operation; indeed, it originated in the law of partnership. It depends upon the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, lawful or unlawful, from the very act of association there arises a kind of partnership, each member being constituted the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them. . . . (Citing cases.)”

In *Tuckerman v. United States* (6 Cir. 1923), 291 Fed. 958, 970, the Court said:

“ . . . It is the general rule that where two or more persons are associated for the same illegal purpose, and even where the indictment does not charge conspiracy, any act or declaration of one of the parties in reference to the common object, and forming part of the *res gestae*, may be given in evidence. *American Fur. Co. v. U. S.*, 2 Pet. 358, 365, 7 L. Ed. 450; *Nudd v. Burrows*, 91 U. S. 426, 23 L. Ed. 286.”

Cossack v. United States (9 Cir. 1936), 82 F. 2d 214, cert. den. 298 U. S. 678, at page 216, quotes from the language of the *Vilson* case (61 F. 2d 901, C. A. 9, 1932), and continues:

“When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while

the same is in progress, are binding on the others. It is not the name by which such a combination is known that matters, but whether such persons are working together to accomplish a common result. * * * The legal principle governing in cases where several are connected in an unlawful enterprise is that every act or declaration of one of those concerned in the furtherance of the original enterprise and with reference to the common object is, in contemplation of law, the act or declaration of all. * * * 16 C. J. sec. 1283, p. 646.

“The common object of persons associated for illegal purposes forms part of the *res gestae*, and acts done with reference to such object are admissible, though no conspiracy is charged. *Vilson v. U. S.*, (*supra*); *Sprinkle v. U. S.* (C. C. A.), 141 Fed. 811.”

Accord:

Coplin v. United States (9 Cir. 1937), 88 F. 2d 652, 661;

Beldon v. United States (9 Cir. 1951), 223 Fed. 726, 730;

United States v. Food & Grocery Bureau (So. Cal. 1942), 43 Fed. Supp. 966, 969.

In the case of *Lee Dip v. United States*, 92 F. 2d 802, 803 (C. A. 9, 1937), which concerns itself with a narcotic offense:

“ . . . Had the two been jointly indicted, the evidence complained of would have been properly admitted as against both. No conspiracy was charged, but there was sufficient evidence from which to infer that one existed in fact. Where there is proof of concert of action between two or more persons in the

commission of an offense, the acts and declarations of one are admissible against the other, although no conspiracy has been charged. *Robinson v. United States* (C. C. A. 9), 33 F. (2d) 238; *Sprinkle v. United States* (C. C. A. 4), 141 F. 811; *Vilson v. United States* (C. C. A. 9), 61 F. (2d) 901; *Cossack v. United States* (C. C. A. 9), 82 F. (2d) 214."

To similar effect:

Shockley v. United States (C. A. 9, 1948), 166 F. 2d 704, at p. 715;

Davis v. United States (C. A. 5, 1926), 12 F. 2d 253, at p. 257.

Conclusion.

It is respectfully suggested that if this Honorable Court grants a rehearing, which is here sought, that a subsequent opinion discuss the principle that, under proper circumstances, the acts and declarations of a confederate are competent evidence in offenses other than conspiracy.

Respectfully submitted,

LAUGHLIN E. WATERS,

United States Attorney,

LOUIS LEE ABBOTT,

Chief, Criminal Division,

Assistant U. S. Attorney,

NORMAN W. NEUKOM,

Chief Trial Attorney,

Assistant U. S. Attorney,

Attorneys for Appellee.

Certificate of Counsel.

Norman W. Neukom, one of the Attorneys for the Appellee, hereby certifies that in his opinion the above petition for rehearing is well founded and is not interposed for delay.

NORMAN W. NEUKOM.

No. 15019

United States
Court of Appeals
for the Ninth Circuit

JAMES MEREDITH, Appellant,

vs.

RICHARD MEREDITH SCRUGGS, CAROL
ELIZABETH SCRUGGS, ATLEE GAIL
SCRUGGS, MERI-JO ABRAMS and LOUIS
EDMUND ABRAMS, Appellees.

Transcript of Record

Appeal from the United States District Court for the
District of Hawaii

FILED

MAR 20 1956

PAUL P. O'BRIEN, CLERK



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Court of Appeals
for the Ninth Circuit

JAMES MEREDITH, Appellant,
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RICHARD MEREDITH SCRUGGS, CAROL
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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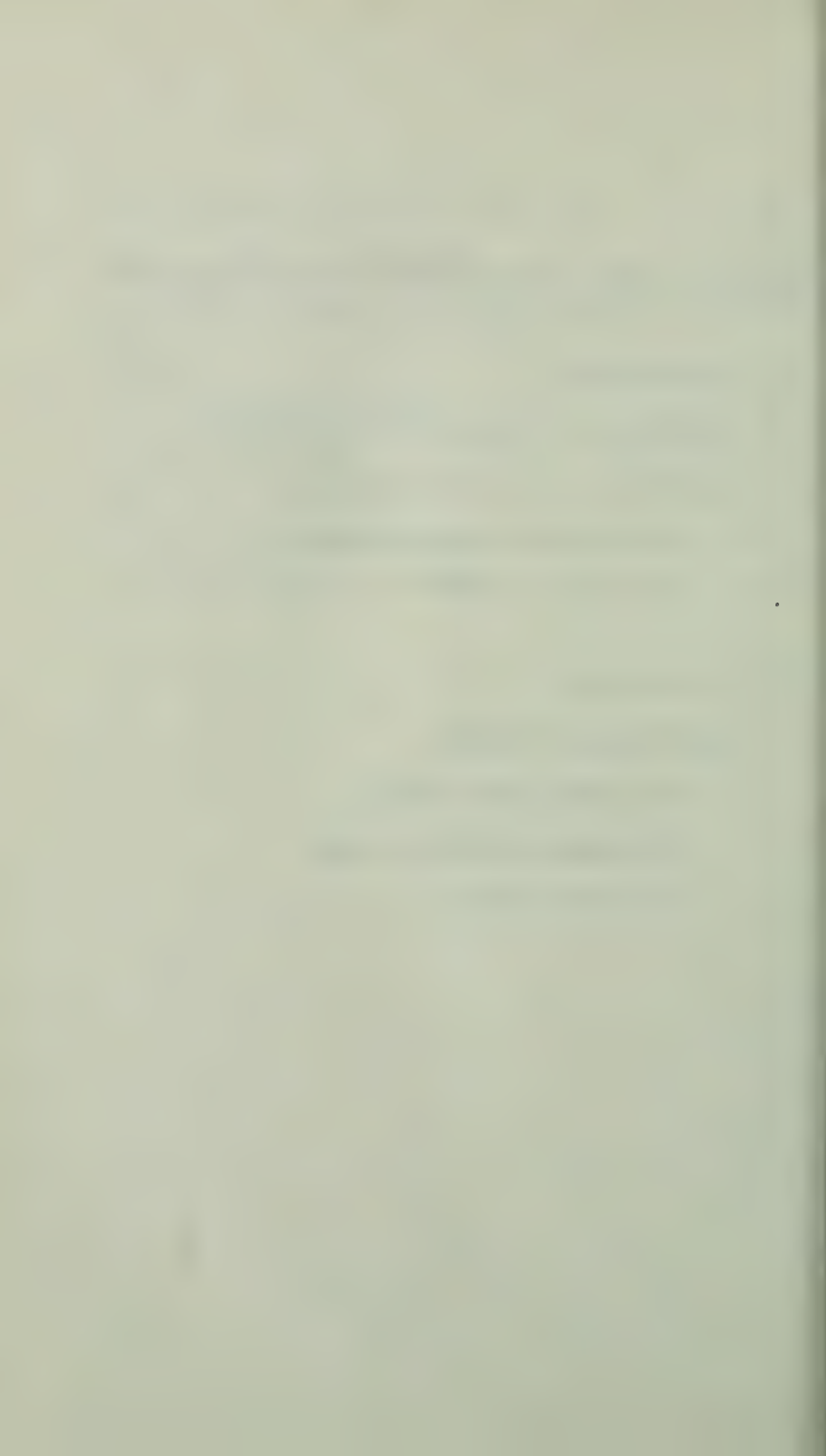
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Dillingham Building Annex,

Honolulu, Hawaii.



In the District Court of the United States for the
District of Hawaii

Civil No. 1444

RICHARD MEREDITH SCRUGGS, CAROL
ELIZABETH SCRUGGS, ATLEE GAIL
SCRUGGS, MERI-JO ABRAMS and LOUIS
EDMUND ABRAMS, Plaintiffs,

vs.

JAMES MEREDITH, Defendant.

COMPLAINT

Plaintiffs Richard Meredith Scruggs, Carol Elizabeth Scruggs, Atlee Gail Scruggs, Meri-Jo Abrams and Louis Edmund Abrams complain of James Meredith, defendant above named, and respectively show as follows:

I.

Plaintiffs are all minors; Richard Meredith Scruggs and Carol Elizabeth Scruggs are residents of the State of California, and bring this action through Louis J. Abrams, their guardian ad litem; Atlee Gail Scruggs, Meri-Jo Abrams and Louis Edmund Abrams are residents of the Territory of Hawaii, and bring this action through Louis J. Abrams, their guardian ad litem; defendant is a resident of the State of Louisiana.

II.

At all times herein mentioned, the United States of America was the owner of a certain motor ve-

hicle, to-wit: a 1952 Fargo Truck, bearing United States Government registration license No. 95-03487; on the 5th day of August, 1953, said owner did permit and authorize defendant to drive said motor vehicle, and defendant did so drive said motor vehicle in a general ewa direction on Kalaniana'ole Highway, a public street in Honolulu, City and County of Honolulu, Territory of Hawaii, in a heedless, careless, reckless and negligent manner, without regard for the lives and safety of others who might be using said highway in the vicinity of No. 5312 Kalaniana'ole Highway.

III.

At the said time and place Elizabeth Cox Abrams, mother of plaintiffs, was a passenger in a motor vehicle being driven by her husband, Louis J. Abrams (father of plaintiffs Meri-Jo Abrams and Louis Edmund Abrams and stepfather of plaintiffs Richard Meredith Scruggs, Carol Elizabeth Scruggs and Atlee Gail Scruggs), and defendant, so operating said motor vehicle in a reckless and negligent manner as aforesaid, caused the same to come into contact with the motor vehicle then being driven by said Louis J. Abrams with great force and violence, thereby inflicting upon said Elizabeth Cox Abrams numerous and multiple serious injuries, some of which are permanent, and requiring extensive surgery, medical attention and hospitalization.

Said Elizabeth Cox Abrams has been unable to attend to her profession since May 1, 1954 until

this date as a direct and proximate result of the negligence of defendant as aforesaid, resulting in loss to plaintiffs of support, maintenance, education, nurture, care, and training which their mother would have given them during said period, all to their damage in the sum of \$106,000.00.

IV.

The said injuries to Elizabeth Cox Abrams have been of such nature as to have required hospitalization at a local hospital and requiring convalescence since August 5, 1953 to the date hereof; said injuries have necessitated a trip to the mainland United States to the Mayo Clinic in Rochester, Minnesota, for delicate surgery; during the said hospitalization both locally and on the mainland United States, plaintiffs were partially deprived of the association, care, attention, acts of kindness and the comfort and solace of her society;

During the period from August 5, 1953 to the date hereof, plaintiffs have been partially deprived of the association, care, attention, acts of kindness and the comfort and solace of her society, by reason of the partial disability to their mother caused by the injuries aforesaid, and plaintiffs will continue to be partially deprived of the association, care, attention, acts of kindness and the comfort and solace of her society, by reason of the permanent nature of said disability to their mother;

All of the foregoing are to the damage of plaintiffs, as they say, in the sum of \$25,000.00.

Wherefore, plaintiffs demand judgment against defendant in the sum of \$131,000.00, together with costs and such other and further relief as may be meet and just.

Dated at Honolulu, Territory of Hawaii, this 4th day of August, 1955.

/s/ LOUIS J. ABRAMS,
Guardian ad litem of Richard Meredith Scruggs,
Carol Elizabeth Scruggs, Atlee Gail Scruggs,
Meri-Jo Abrams and Louis Edmund Abrams,
Plaintiffs.

Duly Verified.

[Endorsed]: Filed August 4, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

The defendant moves the Court as follows:

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

Dated: Honolulu, Hawaii, August 23rd, 1955.

/s/ THOMAS M. WADDOUPS,
Attorney for Defendant
ROBERTSON, CASTLE & ANTHONY,
Of Counsel

Acknowledgment of Service attached.

[Endorsed]: Filed August 23, 1955.

[Title of District Court and Cause.]

ANSWER

Comes now James Meredith, defendant above named, and in answer to complaint herein, respectfully shows:

1. That he is without sufficient information to form a belief as to the truth of paragraph I of said complaint and leaves plaintiffs to their proof thereof.

2. That he is without sufficient information to form a belief as to the truth of the allegations of ownership of the vehicle mentioned in paragraph II of the complaint, admits that he was driving it on August 5, 1953, but denies that he was in any way heedless, careless, reckless or negligent in the manner of its operation.

3. That he is without sufficient information to form a belief as to the truth of the allegations of family relationship contained in paragraph III of the complaint and leaves plaintiffs to their proof thereof; denies all allegations of reckless negligence or carelessness contained in said complaint; and denies the remainder of paragraph III of said complaint.

4. That he is without sufficient information to form a belief as to the truth of the balance of said complaint and leaves plaintiffs to their proof thereof.

5. That all matters contained in said complaint which are not specifically herein admitted are denied.

First Defense

That the proximate cause of any injuries sustained by the alleged mother of plaintiffs, and hence any damage suffered by plaintiffs, was the negligence and carelessness of Louis Abrams, father or step-father of plaintiffs, which as a matter of law must be imputed to said plaintiffs and bar a recovery by them.

Wherefore, defendant prays that upon a hearing hereof the complaint be dismissed and he go hence with his costs.

Dated: Honolulu, Hawaii, October 5th, 1955.

/s/ THOMAS M. WADDOUPS,
Attorney for Defendant

ROBERTSON, CASTLE & ANTHONY,
Of Counsel

Acknowledgment of Service attached.

[Endorsed]: Filed October 5, 1955.

[Title of District Court and Cause.]

RULING ON MOTION TO DISMISS

This is an action brought by minor children for loss of support, maintenance, education, nurture, care, training, attention, acts of kindness, comfort, and solace proximately resulting from a direct personal injury to the mother caused by the negligent act of the defendant. The defendant moved to dismiss the complaint for failure to state a claim upon

which relief can be granted. The precise question presented is whether a minor child has a cause of action for damages resulting from the impairment of rights arising out of the family relationship which have been destroyed or defeated by a wrongdoing third party.

Diversity jurisdiction sustains this cause, and Hawaiian law governs. Under Hawaiian law this is a case of first impression. However,

“* * * because such rights have not heretofore been recognized, is not a conclusive reason for denying them. They will be denied if it appears that the state court has spoken and denied them. If said rights have not been denied in the state court, we see no reason why the Federal Courts should be more prone to deny them or to grant them than a state court. If the state courts have not acted, we are free to take the course which sound judgment demands. In the absence of a state court ruling our duty is tolerably clear. It is to decide, not avoid, the question.”

Daily vs. Parker, 152 F.2d 174, 177 (7 Cir. 1945.)

The basic Hawaiian case recognizing a common law cause of action involving the family is *Kake vs. Horton*, 2 Haw. 209 (1860). In that case, the Court held that a wife can maintain a cause of action to recover for consequential damages resulting to her by reason of the death of her husband caused by the wrongful act of the defendant. She was allowed to recover for loss of support and de-

privation of the society, comfort, and fellowship of her husband. The Hawaii common law was further developed in the case of *Ferreira vs. Honolulu R.T. & L. Co.*, 16 Haw. 615 (1905). The law of the *Kake* case was extended and a father was allowed to recover for the death of a minor child. The Court said:

“It is true that in the cases cited the actions were by widows for the deaths of their husbands, but the reasoning upon which the decisions were based is equally applicable to actions by parents for the deaths of their children.”

16 Haw. at 628. Acts of kindness and attention were sanctioned factors in calculating damages in this case. In *Hall vs. Kennedy*, 27 Haw. 626 (1923), the Court refused to allow the parents to recover for the death of an adult child upon whom they were dependent. The Court reasoned:

“In *Kake vs. Horton*, the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant. The same may be said of the *Ferreira* case for, since by law a father is entitled to the earnings of his son during the son’s minority, a right of action may be maintained by the father against one who, by causing the son’s death, deprives the father

of that legal right. Where, however, no legal right is infringed, no right of action may be maintained. Upon reaching majority a child is under no legal duty of supporting his parent and the parent has no legal claim upon the earnings of his child after majority. In the instant case it is asserted that the deceased was the sole support of plaintiffs, but no legal duty or obligation was on deceased to support plaintiffs."

27 Haw. at 629, 630. This case defined one of the bounds of the common law cause of action and precluded a plaintiff whose claim was based on the death of an adult child from recovering damages despite the factor of dependency. In *Gabriel vs. Margah*, 37 Haw. 571 (1947), the Court, following *Kake and Ferreira*, awarded the parents damages for the loss of association, comfort, and presence of the deceased minor child.

"* * * the cause of action * * * is based upon the statutory legal incidents of the relation pre-existing between the plaintiff and the deceased and the reciprocal legal rights and duties of the parties attached to such relations."

37 Haw. at 577. In *Wilscam vs. United States*, 76 F. Supp. 581 (1948), this Court awarded damages to compensate for the parents' loss of association, comfort and presence of the deceased minor child on the authority of the *Gabriel* case.

The statutory law of Hawaii dealing with the family relationship begins in 1923 with the enactment of the wrongful death act, Act. 245, S.L.

1923. This act was intended to take care of the very situation presented in the Hall case, and recognized a cause of action based exclusively on dependency. The question of whether the wrongful death act repealed the common law cause of action was answered affirmatively in *Globe Indemnity Co. vs. Araki*, 32 Haw. 153 (1931). However, this holding was discarded in the Gabriel case, in which the Court said:

“* * * it was decided by a divided court by way of obiter dictum that the death statute abrogated the common-law remedy for death by a wrongful act but we do not consider the decision in that case to have any binding effect and refuse to adopt the reasoning there advanced for the conclusion reached.”

37 Haw. at 580. In *Enos vs. Motor Coach Co.*, 34 Haw. 5 (1936), the parents and minor sisters of the deceased brought an action under the wrongful death act for damages arising from the loss of care, attention and acts of kindness, comfort, solace of his society, his counsel and advice. The trial court's order sustaining the demurrer was reversed and Hawaii's highest court held that “such acts and conduct are ‘circumstances’ which the court may take into consideration in assessing damages” in a wrongful death act action. In *Young vs. Hon. C. & D. Co.*, 34 Haw. 426 (1938), the father and minor brothers and sister brought suit for damages resulting from the wrongful death of an adult son and brother under the wrongful death act. The opinion recognized the difference between a statu-

tory action and a common law action predicated upon pre-existing reciprocal rights and duties within the family unit. 34 Haw. at 451, 452. This case indeed adds strength to the Hall case for if it could have stood on the common law it would not have been reversed and remanded for further proof of statutory dependency. Taken as a unit, the Hall and Young cases limit in scope the common law action as to consequential damages for loss of care, nurture, and the like. The Hawaiian courts permit such suits only in instances where a recognized legal duty within the family relationship exists between the party bringing the action and the injured party. This excludes actions based upon the relationship of parent and adult child, adult brother-sister and minor brother-sister, or minor brother-sister and minor brother-sister.

In 1953, the legislature amended Chapter 221 of the Revised Laws of Hawaii by Act 206, an act to provide for the survival of tort actions for physical injury or death, where the wrongdoer or other person liable dies. Section 10494 [J. F. Mc] reads:

“All rights of action arising out of physical injury to the person and rights of action arising out of the death of a person by wrongful act in favor of his dependents or in favor of persons toward whom the deceased occupied the relationship of husband, wife, parent or minor child, shall survive notwithstanding the death of the wrongdoer or any other person who may be liable for damages for such physical injury or death.”

In January, 1955, in *Ginoza vs. Takai Electric Co.*, 40 Haw. 691, where the wife and minor children sought damages under the wrongful death act for the death of the husband and father, the Court permitted the wife to recover for loss of support and well being and allowed the children to recover for the loss of support, maintenance, education, nurture, care and training. Later this year the Hawaiian legislature passed Act 205 effective May 27, 1955, which incorporates all of the protections previously accorded members of the family under the common law as well as the statutes, and, in addition, gave initial recognition to the survival of tort actions where the injured person dies. Furthermore, all the elements of damages recognized both in common law and statutory cases are now specifically spelled out. The pertinent parts of the act read:

“In any such action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (a) loss of society, companionship, comfort, consortium or protection, (b) loss of marital care, attention, advice or counsel, (c) loss of filial care or attention or (d) loss of parental care, training, guidance or education suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person.”

The foregoing review indicates very clearly that

Hawaii intends to protect all legal interests of the family. The decided cases to date to be sure have all been wrongful death cases. However, the cause of action is not founded upon the degree or quantity of the loss. Rather is it premised upon an invasion of a right. So it is that both logic and the law agree that redress may be had for a temporary impairment as well as for the total destruction of a right incident to the family relationship.

This Court is aware of the practical difficulties adverted to in 83 Penn. Law Review 276-277. However, these difficulties have been more than amply and satisfactorily disposed of in 20 Cornell Law Quarterly 255-257. In other jurisdictions the courts are not in accord as to the existence of the cause of action in behalf of a wife or minor child for damages resulting from deprivation of rights arising from the family relationship. Cases recognizing the cause of action include: *Daily vs. Parker*, supra, causing father to desert home; *Russick vs. Hicks*, 85 F. Supp. 281 (Mich. 1949), causing mother to desert home; *Hitaffer vs. Argonne Co., Inc.*, 87 U.S. App. D.C. 57, 183 F.2d 811, 23 A.L.R. 2d 1366 (1950), negligent injury to husband; *Miller et al., vs. Monsen*, 228 Minn. 400, 37 N.W. 2d 543 (1949), enticing mother from home; *Johnson, et al., vs. Luhman*, 330 Ill. App. 598, 71 N.E. 2d 810 (1947), alienation of affection of father. Contra: *Morrow vs. Yannantuono*, 152 Misc. 134, 273 N.Y.S. 912 (1934), enticing mother away from home; *Eschenbach vs. Benjamin*, 195 Minn. 378, 263 N.W. 154 (1935), negligent injury to husband-father; *McMillan vs. Taylor*, 81 U.S. App. D.C. 322, 160 F.2d 221 (1946), enticing

mother away from home; *Taylor vs. Keefe*, 134 Conn. 156, 56 A. 2d 768 (1947) alienation of mother's affection; *Edler vs. MacAlpine-Downie*, 86 U.S. App. D.C. 97, 180 F.2d 385 (1950), enticing father from home; *Hill, et al., vs. Sibley Memorial Hospital*, 108 F. Supp. 739 (D.C. 1952), negligent injury to wife-mother. In the *Hill* case, Judge Youngdahl said:

"The common law should continually be re-appraised and reinterpreted to meet changing circumstances. This Court confesses that it has been difficult for it on the basis of natural justice to reach the conclusion that this type of an action will not lie. When a child loses the love and companionship of a parent it is deprived of something that is indeed valuable and precious. Courts should ever be alert to widen the circle of justice to conform to the changing needs and conditions of society. At the same time a lower court should be cautious in laying down a completely new rule in the light of prior holdings of our Court of Appeals indicating hesitancy to extend the right of recovery of damages for such loss to a child. If there is to be any change in that doctrine this Court does not feel that it should be the one to initiate it."

108 F. Supp. at 741. It is significant that *Hitaffer*, which recognized a cause of action in the wife, was decided later than *Edler* and *McMillan*, on which Judge Youngdahl relied as indicating the trend in the District of Columbia.

In Hawaii, both by the common law and statute, loss of support, maintenance, education, nurture, care, training, attention, acts of kindness, comfort and solace are recognized factors in computing damage to the injured right incident to the family relationship. Indeed, the cases reveal that Hawaii has led the country in upholding the cause of action in this area and I see no reason why the trend in Hawaii should stop now.

I therefore hold that the complaint states a cause of action upon which relief can be granted, in accordance with my oral ruling rendered on September 19, 1955.

Motion denied.

Dated: Honolulu, Hawaii, October 19, 1955.

/s/ J. FRANK McLAUGHLIN,
United States District Judge

[Endorsed]: Filed October 19, 1955.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find in favor of the Plaintiff, Atlee Gail Scruggs, and assess her damages at the sum of Three Thousand and No/100 Dollars (\$3,000.00).

Dated, this 7th day of December, 1955.

/s/ SUSIE VAN CULIN,
Foreman

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find in favor of the Plaintiff, Richard Meredith Scruggs, and assess his damages at the sum of Five Hundred and no/100 Dollars (\$500.00).

Dated, this 7th day of December, 1955.

/s/ SUSIE VAN CULIN,
Foreman

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find in favor of the Plaintiff, Carol Elizabeth Scruggs and assess her damages at the sum of Five Hundred and no/100 Dollars (\$500.00).

Dated, this 7th day of December, 1955.

/s/ SUSIE VAN CULIN,
Foreman

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find in favor of the Plaintiff, Meri-Jo Abrams, and assess her damages at the sum of Three Thousand and no/100 Dollars (\$3,000.00).

Dated, this 7th day of December, 1955.

/s/ SUSIE VAN CULIN,
Foreman

[Endorsed]: Filed December 7, 1955.

[Title of District Court and Cause.]

VERDICT

We, the Jury in the above entitled cause, find in favor of the Plaintiff, Louis Edmund Abrams, and assess his damages at the sum of Three Thousand and no/100 Dollars (\$3,000.00).

Dated, this 7th day of December, 1955.

/s/ SUSIE VAN CULIN,
Foreman

[Endorsed]: Filed December 7, 1955.

In the United States District Court for the
District of Hawaii

Civil No. 1393

ELIZABETH COX ABRAMS and LOUIS J.
ABRAMS, Plaintiffs,

vs.

JAMES MEREDITH, Defendant.

Civil No. 1444

RICHARD MEREDITH SCRUGGS, CAROL
ELIZABETH SCRUGGS, ATLEE GAIL
SCRUGGS, MERI-JO ABRAMS, and LOUIS
EDMUND ABRAMS, Plaintiffs,

vs.

JAMES MEREDITH, Defendant.

JUDGMENT

The above entitled actions having been tried before the Honorable J. Frank McLaughlin, and a jury, and on the 7th day of December, 1955 the jury having rendered a verdict in favor of the plaintiff Elizabeth Cox Abrams and against the defendant James Meredith, in the sum of \$40,000.00; and the jury having rendered a verdict in favor of the plaintiffs Richard Meredith Scruggs and Carol Elizabeth Scruggs and against the defendant James Meredith in the sum of \$500.00 to each of said plaintiffs; and the jury having rendered a verdict

in favor of the plaintiffs Atlee Gail Scruggs, Meri-Jo Abrams and Louis Edmund Abrams and against the defendant James Meredith in the sum of \$3,000.00 to each of said plaintiffs; and the jury not having rendered a verdict in favor of plaintiff Louis J. Abrams; it is

Ordered, Adjudged and Decreed that:

1. Plaintiff Elizabeth Cox Abrams recover of defendant the sum of \$40,000.00, and her costs of action;

2. Plaintiffs Richard Meredith Scruggs and Carol Elizabeth Scruggs each recover of defendant the sum of \$500.00, and their costs of action;

3. Plaintiffs Atlee Gail Scruggs, Meri-Jo Abrams and Louis Edmund Abrams each recover of defendant the sum of \$3,000.00, and their costs of action;

4. Plaintiff Louis J. Abrams recover nothing of defendant.

Dated: December 16th, 1955 at Honolulu, T. H.

By the Court:

/s/ WM. F. THOMPSON, JR.,
Clerk

Approved as to Form:

/s/ THOMAS M. WADDOUPS,
Attorney for Defendant

[Endorsed]: Filed December 16, 1955.

[Title of District Court and Cause No. 1444.]

MOTION FOR NEW TRIAL

Defendant moves the Court that a new trial be granted upon the following grounds:

1. That the verdict of the jury is contrary to law and contrary to the evidence;

2. That there was no evidence that during the period between the time of the injury and the date of the verdict the two Scruggs children, who were on the mainland, were in a position to receive any acts of kindness, attention or other participation in the family unit which would give them a cause of action;

3. That there was no evidence upon which a jury could base any monetary loss as to any of the children because the evidence showed affirmatively that they were in a position to receive more of their mother's attention since her injury than they did before;

4. That there is now pending in the First Circuit Court of the Territory of Hawaii, in Civil No. 1409, a motion which will permit the Territorial Courts to decide what law will govern the Territory, and in the event the Court's ruling is adverse to that of this Honorable Court's ruling on motion to dismiss herein, it will be an indication of the views of the Territorial Courts on the subject. In the event the Territorial Court rules that no cause of

action exists in such cases, that ruling will be made a ground for the granting of this motion.

Dated: Honolulu, Hawaii, December 23, 1955.

/s/ THOMAS M. WADDOUPS,
Attorney for Defendant

ROBERTSON, CASTLE & ANTHONY,
Of Counsel

Acknowledgment of Service attached.

[Endorsed]: Filed December 27, 1955.

[Title of District Court and Cause No. 1444.]

ORDER DENYING MOTION FOR NEW
TRIAL

The motion for new trial having come on duly to be heard,

It Is Hereby Ordered that the motion is denied.

Dated: Honolulu, Hawaii, January 6, 1956.

/s/ J. FRANK McLAUGHLIN,
Judge of the Above Entitled Court

Attest:

/s/ WM. F. THOMPSON, JR., Clerk

[Endorsed]: Filed January 6, 1956.

[Title of District Court and Cause No. 1444.]

NOTICE OF APPEAL

Notice Is Hereby Given that James Meredith, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on December 16, 1955.

Dated: Honolulu, Hawaii, January 6th, 1956.

/s/ THOMAS M. WADDOUNS,
Attorney for Defendant

ROBERTSON, CASTLE & ANTHONY,
Of Counsel

Acknowledgment of Service attached.

[Endorsed]: Filed January 6, 1956.

[Title of District Court and Cause No. 1444.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

That James Meredith, defendant above named, by his attorney Thomas M. Waddoups, hereby acknowledges himself to be bound to pay to Richard Meredith Scruggs, Carol Elizabeth Scruggs, Atlee Gail Scruggs, Meri-Jo Abrams and Louis Edmund Abrams, plaintiffs, the sum of Two Hundred Fifty Dollars (\$250).

The Condition of this bond is that whereas the defendant has filed an appeal to the Court of Appeals for the Ninth Circuit by notice of appeal filed January 6, 1956 from the judgment of this Court entered December 16, 1955, if the defendant shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the defendant fails to perform this condition, payment of the amount of this bond shall be due forthwith.

There is deposited herewith in cash with the Clerk of Court for the United States District Court for the District of Hawaii the sum of Two Hundred Fifty Dollars (\$250) as surety for said bond.

Dated: Honolulu, Hawaii, January 6th, 1956.

JAMES MEREDITH,

/s/ By THOMAS M. WADDOUPS,

His Attorney

Verification

Territory of Hawaii,
City and County of Honolulu—ss.

Comes now Thomas M. Waddoups, attorney for James Meredith, defendant above named, and states that he is attorney of record for said James Meredith and signs the foregoing bond in his behalf.

/s/ THOMAS M. WADDOUPS,

Subscribed and sworn to before me this 6th day of January, 1956.

[Seal] /s/ CHARLES Y. [Illegible]
Notary Public, First Judicial Circuit, Territory of
Hawaii.

Acknowledgment of Service attached.

[Endorsed]: Filed January 6, 1956.

[Title of District Court and Cause.]

DOCKET ENTRIES

1955

- Aug. 4—Motion for Appointment of Guardian Ad Litem for Infant Plaintiffs and Order Appointing Guardian Ad Litem for Infant Plaintiffs filed. Complaint filed. Summons issued. Two copies of pleadings certified and issued for service. Marshal's returns filed (served T. H. Treasurer).
- Aug. 8—Notice of Service filed.
- Aug. 9—Demand for Trial by Jury filed.
- Aug. 18—Stipulation filed 9-1-55.
- Aug. 23—Motion to Dismiss and Memorandum filed.
- Sept. 16—Entering proceedings at hearing on Motion to Dismiss—Remarks by Court—Argument by Waddoups—Argument by Trask—Continued to Sept. 19, 1955 at 9 a.m. for further hearing.

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- Sept. 19—Entering proceedings at further hearing on Motion to Dismiss—Argument by Trask continued—Closing argument by Waddoups—Remarks by Court—Oral Ruling—Motion to Dismiss Denied—To file written ruling—Allowed two weeks to answer or otherwise plead.
- Sept. 20—Reporter's transcript Oral Ruling filed.
- Oct. 3—Entering order—Defense allowed additional two days to file answer, etc.
- Oct. 5—Answer filed.
- Oct. 10—Entering order—agreement counsel consolidated with Civil 1393 for Trial—Waddoups to file third party complaint, etc.
- Oct. 19—Waiver filed—Motion to Bring in Third-Party Defendant and Notice filed—Ruling on Motion to Dismiss filed—McLaughlin—Denied.
- Oct. 20—Entering Order—Trial reset for Nov. 7, 1955 at 9 a.m., etc.
- Oct. 21—Entering proceedings at hearing on motion to bring in third party defendant—Arguments by Waddoups—Trask and Waddoups taken under advisement.
- Nov. 4—Ruling Upon Motion to Bring in Third-Party Defendant filed. McLaughlin—Denied.
- Nov. 7—Entering proceedings at Trial—Jury—see Civil 1393.

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Nov. 8—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 10—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 14—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 15—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 16—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 21—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 22—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 23—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 25—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 28—Entering proceedings at Trial—Jury—
see Civil 1393.

Nov. 29—Entering proceedings at Trial—Jury—
see Civil 1393.

Dec. 1—Entering proceedings at Trial—Jury—
see Civil 1393.

Dec. 2—Entering proceedings at Trial—Jury—
see Civil 1393.

Dec. 6—Entering proceedings at Trial—Jury—
see Civil 1393.

Dec. 7—Entering proceedings at Trial—Jury—
see Civil 1393.

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- Dec. 7—Verdicts filed. Find in favor of the Plaintiff Richard Meredith Scruggs and assess his damages at the sum of Five Hundred and no/100 Dollars (\$500.00).
- Dec. 7—Find in favor of the Plaintiff Carol Elizabeth Scruggs and assess her damages at the sum of Five Hundred and no/100 Dollars (\$500.00).
- Dec. 7—Find in favor of Plaintiff, Atlee Gail Scruggs and assess her damages at the sum of Three Thousand and no/100 Dollars (\$3,000.00).
- Dec. 7—Find in favor of Plaintiff, Meri-Jo Abrams and assess her damages at the sum of Three Thousand and no/100 Dollars (\$3,000.00).
- Dec. 7—Find in favor of the Plaintiff, Louis Edmund Abrams, and assess his damages at the sum of Three Thousand and no/100 Dollars (\$3,000.00).
- Dec. 16—Judgment filed (See Civil 1393) and entered. Favor Plaintiffs Richard Meredith Scruggs \$500; Carol Elizabeth Scruggs \$500; Atlee Gail Scruggs \$3,000; Meri-Jo Abrams \$3,000; Louis Edmund Abrams \$3,000; and costs (\$36.20).
- Dec. 16—Motion for Taxation of Costs and Notice of Motion for Taxation of Costs filed (Copy).
- Dec. 27—Motion for New Trial filed.

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Dec. 27—Memo re motion for new trial filed.

Dec. 27—Entering proceedings at hearing on motion for taxation of costs (see Civil 1393).

Dec. 30—Entering proceedings at hearing on Motion for New Trial—Argument by Wad-doups—argument by Trask—Oral Ruling—Motion Denied.

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Jan. 6—Order Denying Motion for New Trial filed.

Jan. 6—Notice of Appeal filed.

Jan. 6—Bond for Costs on Appeal filed.

Jan. 6—Statement of Points on Appeal filed.

Jan. 6—Designation of Record on Appeal filed.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 50 consists of a statement of the names and addresses of the attorneys of record and of the various pleadings as hereinbelow listed and indicated:

Complaint and Summons;

Motion to Dismiss and Memorandum;

Answer;

Ruling Upon Motion to Dismiss;

Verdict—Atlee Gail Scruggs, Richard Meredith Scruggs, Carol Elizabeth Scruggs, Meri-Jo Abrams, Louis Edmund Abrams;

Motion for New Trial;

Order Denying Motion for New Trial;

Notice of Appeal;

Bond for Costs on Appeal;

Statement of Points on Appeal;

Designation of Record on Appeal;

Judgment.

I further certify that included in said record on appeal is a copy of the Docket Entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 13th day of January, 1956.

[Seal] /s/ WM. F. THOMPSON, JR.,
 Clerk, U.S. District Court,
 District of Hawaii

[Endorsed]: No. 15019. United States Court of Appeals for the Ninth Circuit. James Meredith, Appellant, vs. Richard Meredith Scruggs, Carol Elizabeth Scruggs, Atlee Gail Scruggs, Meri-Jo Abrams and Louis Edmund Abrams, Appellees. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed: January 30, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15019

JAMES MEREDITH, Appellant,
vs.

RICHARD MEREDITH SCRUGGS, CAROL
ELIZABETH SCRUGGS, ATLEE GAIL
SCRUGGS, MERI-JO ABRAMS and LOUIS
EDMUND ABRAMS, Appellees.

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

Appellant intends to rely on the following points on appeal:

1. The court erred in overruling appellant's motion to dismiss since the complaint herein failed to

state a claim against appellant upon which relief could be granted.

2. The court erred in entering judgment for the appellees and against appellant since the complaint failed to state a claim upon which relief could be granted against appellant.

3. The court erred in overruling the motion to dismiss and in granting judgment for the appellees against the appellant in that minor children have no claim for relief based upon the loss of support, maintenance, education, nurture, care and training or association, care, attention, acts of kindness, comfort and solace of the society of a parent injured, where the parent survives the injury.

Dated: Honolulu, Hawaii, January 14, 1956.

/s/ THOMAS M. WADDOUPS,
Attorney for Appellant

ROBERTSON, CASTLE & ANTHONY,
Of Counsel

[Endorsed]: Filed January 25, 1956. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant hereby designates the following portions of the record to be printed on appeal in the above entitled cause:

1. Complaint.
2. Motion to Dismiss.
3. Ruling on motion to dismiss filed October 19, 1955.
4. Answer.
5. Verdict in favor of Atlee Gail Scruggs rendered December 7, 1955.
6. Verdict in favor of Richard Meredith Scruggs rendered December 7, 1955.
7. Verdict in favor of Carol Elizabeth Scruggs rendered December 7, 1955.
8. Verdict in favor of Meri-Jo Abrams rendered December 7, 1955.
9. Verdict in favor of Louis Edmund Abrams rendered December 7, 1955.
10. Judgment entered December 16, 1955.
11. Motion for new trial filed December 27, 1955.
12. Order denying motion for new trial filed January 6, 1956.
13. Notice of appeal to United States Court of Appeals for the Ninth Circuit under Rule 73(b) filed January 6, 1956.

14. Bond for costs on appeal filed January 6, 1956.

15. Statement of Appellant's points on appeal dated January 6, 1956, and filed herewith.

16. Journal entries.

17. Appellant's designation of record on appeal filed in the United States District Court for the District of Hawaii January 6, 1956.

18. Appellant's statement of points to be relied on.

19. This designation of record to be printed on appeal.

Dated: Honolulu, Hawaii, January 14, 1956.

/s/ THOMAS M. WADDOUPS,
Attorney for Appellant

ROBERTSON, CASTLE & ANTHONY,
Of Counsel

[Endorsed]: Filed January 25, 1956. Paul P. O'Brien, Clerk.

No. 15,019

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES MEREDITH,

Appellant,

vs.

RICHARD MEREDITH SCRUGGS, CAROL
ELIZABETH SCRUGGS, ATLEE GAIL
SCRUGGS, MERI-JO ABRAMS and LOUIS
EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court
for the District of Hawaii.

BRIEF FOR JAMES MEREDITH, APPELLANT.

THOMAS M. WADDOUPS,

FRANK D. PADGETT,

312 Castle & Cooke Building, Honolulu, Hawaii.

Counsel for James Meredith,

Appellant.

ROBERTSON, CASTLE & ANTHONY,

312 Castle & Cooke Building, Honolulu, Hawaii.

Of Counsel.

FILED

APR 12 1956

PAUL P. O'BRIEN, CLERK



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No. 15,019

IN THE

**United States Court of Appeals
For the Ninth Circuit**

JAMES MEREDITH,

Appellant,

vs.

RICHARD MEREDITH SCRUGGS, CAROL

ELIZABETH SCRUGGS, ATLEE GAIL

SCRUGGS, MERI-JO ABRAMS and LOUIS

EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court
for the District of Hawaii.

BRIEF FOR JAMES MEREDITH, APPELLANT.

JURISDICTIONAL STATEMENT.

The jurisdiction of the District Court was based upon Title 28 U.S.C. Section 1331. The jurisdiction of this Court is founded on Title 28 U.S.C. Section 1291.

The judgment below was entered December 16, 1955 (R. 20). A motion for new trial was filed December 27, 1955, and denied on January 6, 1956 (R. 22, 23). Notice of Appeal was filed January 6, 1956 (R. 24).

STATEMENT OF THE CASE.

The complaint of Appellees (five minors) claimed damages allegedly sustained when their mother was injured in an automobile accident. It alleges damages for loss of "support, maintenance, education, nurture, care and training", and for partial loss of "the association, care, attention, acts of kindness, comfort and solace" of their mother's society (R. 5). Appellant moved to dismiss this complaint (R. 6) which motion was denied (R. 8) and Appellant answered (R. 7). The mother also brought suit for her damages arising out of the same accident and that suit was consolidated with this one for trial (R. 27). The jury returned verdicts in favor of the mother for \$40,000.00 and for the Appellees as follows:

Atlee Gail Scruggs, Meri-Jo Abrams, and Louis Edmund Abrams each recovered \$3,000.00 and Richard Scruggs and Carol Elizabeth Scruggs each recovered \$500.00 (R. 17-19). Judgment in the amount set forth was entered on December 16, 1955 (R. 20, 21). A motion for new trial was filed December 27, 1955 (R. 22, 23), and denied on January 6, 1956 (R. 23). Notice of Appeal was filed January 6, 1956 (R. 24).

SPECIFICATIONS OF ERROR.

(1) The Court below erred in overruling Appellant's motion to dismiss since the complaint failed to state a claim upon which relief could be granted.

(2) The Court below erred in entering judgment for the Appellees and against Appellant since the

complaint failed to state a claim upon which relief could be granted.

(3) The Court below erred in overruling the motion to dismiss and in granting judgment for the Appellees against the Appellant in that minor children have no claim for relief based upon the loss of support, maintenance, education, nurture, care and training or association, care, attention, acts of kindness, comfort and solace and society of a parent injured where a parent survives the injury.

SUMMARY OF ARGUMENT.

Minor children have no claim for damage for the interruption of the parent and child relationship resulting from a non-fatal injury to a parent. The existence of such a cause of action has been steadfastly denied by American and English decisions. It is not founded upon Hawaiian statutes nor Hawaiian judicial precedent. The judicial creation of such a novel claim for relief would have far reaching consequences in the law of torts e.g., upsetting settlements entered into in good faith, a multiplication of actions where one existed before and the imposition of obstacles to the settlement of personal injury claims. If a lacuna in the common law exists, it should be filled by the Hawaiian Legislature rather than by the federal courts.

ARGUMENT.

- (1) **THE COMMON LAW AS DECIDED BY ENGLISH AND AMERICAN DECISIONS DOES NOT RECOGNIZE THE CLAIM HERE ASSERTED.**

A. The Direct Authorities.

As far as we are able to ascertain only three previous cases directly involving the point here at issue have been decided.

The first is *Hill v. Sibley Memorial Hospital*, 108 F. Supp. 739 (D.C. 1952). In that case the Court said:

Courts should ever be alert to widen the circle of justice to conform to the changing needs and conditions of society. At the same time a lower Court should be cautious in laying down a completely new rule in the light of prior holdings of our Court of Appeals indicating hesitancy to extend the right of recovery of damages for such loss to a child. If there is to be any change in that doctrine this Court does not feel that it should be the one to initiate it.

Another case is *Jeune v. Del E. Webb Const. Co.*, 77 Ariz. 226, 269 P. 2d 723 (1954). In that case the court denied that either a wife or child had a right of action for damages arising out of the loss of the comfort and society of the husband and father. It stated:

Concerning the right of a minor child to separately sue for its damages resulting from personal injuries to the father, the plaintiffs refer us to no case that has ever authorized such an action. There is much theorizing that such should be the law but nothing to show us it ever has been the law . . . We are not aware of any jurisdiction that has ever authorized such an action and be-

lieve there are none. The reason probably is that never before was it attempted. The cause of action for personal injury to the father rests with him for all the resulting damage. It never has been the law that multiple actions could be brought by each member of the family for a negligent injury sustained by the father. It is unnecessary to discuss other reasons urged by appellee as a basis for sustaining the action of the trial court. (p. 724)

Earlier in *Eschenbach v. Benjamin*, 195 Minn. 378, 263 N. W. 154 (1935), the Minnesota court had denied the existence of such a cause of action, and pointing to the practical reasons why the courts have not recognized it, stated:

Were we to sustain plaintiffs' contentions it is obvious that each minor child would have a distinct and separate cause of action. In the instant case, instead of having one cause by the husband alone, there would also be a cause of action by the wife and one for each minor child. If this rule were to be extended as plaintiffs would have us do, then, carried to its logical conclusion, there would, in many accident cases, be litigation almost without end, all based upon a single tort and only one individual physically involved in the accident itself. (pp. 155-6)

There are, in addition, several discussions of the question by way of dicta. In *Stout v. Kansas City Terminal Railway Co.*, 172 Mo. App. 113, 157 S. W. 1019 (1913), the court said:

The entire damage in cases of negligent injury to a husband or father has always been consid-

ered as centering in him and his right in the premises has always been thought to be exclusive; and a settlement with him has always been recognized as closing the incident. No case has been found to support a different conception of the rights of the parties. Any other view would lead to absurd results. (p. 1021)

In *Blair v. Seitner Dry Goods Co.*, 184 Mich. 304, 151 N. W. 724 (1915), the court said:

If a husband is injured and recovers his damages, his wife cannot usually recover damages. The husband has usually, as a result of his action, been compensated for his pain and suffering, past and future, for loss of time, for diminution of capacity to earn money. The minor children of an injured father and those of an injured mother may suffer on account of the injury, but it has never been considered that they had an action therefor. (p. 727)

In *Feneff v. New York Cent. & H. R. R. Co.*, 203 Mass. 278, 89 N. E. 436 (1909), it was stated:

The minor children of an injured father who is legally bound to furnish them with support may suffer indirectly from his injury. So too may his wife, to whom he owes the same legal duty to furnish support; yet it was never held that a wife or minor child could recover for the consequences of a father's disability, against one who had negligently injured him. The diminished value of the husband's consortium with his wife, in such a case, is like the diminished value of the work that the husband can do for the support of his wife and the education and support of his minor children. The negligent defendant is sup-

posed to have made full pecuniary compensation to the husband and father for his injury. In the benefit from this payment the wife and children may be expected to share to some extent. If they still suffer loss, it is not direct, but only consequential. (p. 437)

It is thus obvious that the courts applying common law, in dealing directly with the claim for relief here sought to be asserted, have unanimously rejected that cause.

B. The Arguments by Way of Analogy.

The Court below purported to rely by way of analogy upon the decisions in *Hitafter v. Argonne Co.*, 183 F. 2d 811 (C.A.D.C. 1950), and *Daily v. Parker*, 152 F. 2d 174 (7th Cir. 1945). In the *Hitafter* case, a wife sought to recover damages for loss of consortium arising out of the alleged negligent injury of her husband by his employer. The Court of Appeals ruled:

(1) That a wife could bring an action for damages arising out of the negligent injury of her husband, and

(2) That the exclusive remedy provision of the Longshoremen and Harbor Workers Compensation Act did not prevent the suit.

In that case, the Court of Appeals recognized that the common law did not permit a wife to sue for damages arising out of the negligent injury of her husband. As it pointed out, only one case had ever sustained such a claim for relief. *Hipp v. E. I. Du-pont de Nemours & Co.*, 182 N. C. 9, 108 S. E. 318

(1921), and that case had been effectively overruled, in the later case of *Hinnant v. Tide Water Power Co.*, 189 N. C. 120, 126 S. E. 307 (1925). However, the Court of Appeals rejected the decided cases and upheld the claim for relief. Since then, however, the *Hitafter* case would appear to have been, in effect, overruled by *Brown v. Curtin & Johnson, Inc.*, 221 F. 2d 106 (C.A.D.C. 1955), where the court held that a wife had no right of action for loss of consortium or other injury on account of the death of her husband by wrongful act. Moreover, while the *Hitafter* case was followed in *Brown v. Georgia-Tennessee Coaches, Inc.*, 88 Ga. App. 519, 77 S. E. 2d 24 (1953), and *Cooney v. Moomaw*, 109 F. Supp. 448 (D.C. Neb. 1953), it has been rejected in every other jurisdiction which has had occasion to pass upon the problem.

Coastal Tank Lines, Inc. v. Canoles, 207 Md. 37, 113 A. 2d 82 (1955);

Garrett v. Reno Oil Company, 271 S. W. 2d 764 (Tex. Civ. App. 1954);

Ripley v. Ewell, 61 S. 2d 420 (Fla. 1952);

Franzen v. Zimmerman, 127 Colo. 381, 256 P. 2d 897 (1953);

La Eace v. Cincinnati, Newport & Covington Ry. Co. Inc., 249 S. W. 2d 534 (Ky. 1952);

Larocca v. American Chain & Cable Co., 23 N. J. Super. 195, 92 A. 2d 811 (1952);

Nelson v. Lockett & Co., 206 Okla. 334, 243 P. 2d 719 (1952);

Ash v. Mullen, Inc., 43 Wash. 2d 345, 261 P. 2d 118 (1953);

Werthan Bag Corp. v. Agnew, 202 F. 2d 119
(C.A. 1953);

O'Neil v. United States, 202 F. 2d 366 (C.A.
D.C. 1953);

Cook v. Snyder, 119 N. Y. S. 2d 481 (1953);

Best v. Samuel Fox & Co., (1952) A. C. 716.

See, also:

3 *Restatement, Torts*, Sec. 695.

Of course, even if the *Hitafter* case represented the common law, it would not be controlling here, for that case is based upon the wife's right to the consortium of her husband. A child has no such right. Under the Hawaiian statutes on divorce, *Chapter 296, R.L.H. 1945*, as construed by the Supreme Court of Hawaii, a wife has a legal right to the love, affection, and physical presence of her husband. He cannot, without reasonable cause, absent himself and live apart from her. *Kaikona v. Kaikona*, 36 Hawaii 49 (1942). These principles, of course, are not unique in Hawaii, but are universally recognized in American and English jurisdictions.

On the other hand, while parents are under a duty to provide for their children pursuant to Sec. 12264, *R.L.H. 1945*, nothing in the statutes or in the Hawaiian common law requires a parent to love a child or even to furnish personal guidance or education. Many parents, for example, find it for the best interests of their children to place them in boarding schools or other institutions far from the home of their parents, and the law recognizes the right of the parents to do this.

In *Daily v. Parker*, 152 F. 2d 174 (7th Cir. 1945), the Court of Appeals for the Seventh Circuit held that a child had a right of action against a person enticing its parent away from the home. While this case was followed in *Johnson v. Luhman*, 330 Ill. App. 598, 71 N. E. 2d 810 (1947); *Russick v. Hicks*, 85 F. Supp. 281 (D.C. Mich. 1949), and *Miller v. Monsen*, 228 Minn. 400, 37 N. W. 2d 543 (1949), it does not represent the common law. Every other court passing upon the problem since the *Daily* case has refused to adhere to the rule there laid down.

Edler v. MacAlpine-Downie, 180 F. 2d 385
(C.A.D.C. 1950);

Nelson v. Richwagen, 326 Mass. 485, 95 N. E.
2d 545 (1950);

Taylor v. Keefe, 134 Conn. 156, 56 A. 2d 768
(1947);

Rudley v. Tobias, 84 Cal. App. 2d 454, 190 P.
2d 984 (1948);

Kleinow v. Ameika, 19 N. J. Super. 165, 88 A.
2d 31 (1952);

Henson v. Thomas, 231 N. C. 173, 56 S. E. 2d
432 (1949);

Garza v. Garza, 209 S. W. 2d 1012 (Tex. Civ.
App. 1948);

Scholberg v. Intyre, 264 Wis. 211, 58 N.W. 2d
698 (1953);

Katz v. Katz, 95 N. Y. S. 2d 863 (1950).

See also 20 Mo. L. Rev. 107 where an excellent article dealing with *Hitafter* and *Daily* as well as the type of claim here involved appears.

Not only is the *Daily* rule contrary to the common law, but it is clearly distinguishable from the principle involved in this case. Removing a parent from the home is a deliberate and direct interference with the parent-child relationship. On the other hand, where the parent is injured by the negligence of the third party, the interference is consequential and not deliberate. Neither of the analogies relied on by the court below represents the common law or is, on analysis, analogous.

(2) THE COURT BELOW ERRED IN FAILING TO FOLLOW THE COMMON LAW AS REQUIRED BY HAWAIIAN STATUTE.

Sec. 1, R.L.H. 1945, provides in part:

The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii . . .

As we have seen, the common law did not recognize the existence of the claim for relief which the District Court upheld. While it is true that this statute does not confine the Hawaiian courts to a fixed set of precedents but allows a degree of flexibility to meet changes in the common law as they develop, *Vierra v. Campbell & Moody*, 40 Hawaii 86 (1953); *Welsh v. Campbell*, 41 Hawaii 106 (1955), nevertheless, where, as here, there is a unanimity of judicial authority opposing the claim sought to be asserted and, where no Hawaiian statute or judicial precedent upholds such claim, then the Hawaiian courts do not ignore the command of the statute, but apply the common law.

A case in point is *Hall v. Kennedy*, 27 Hawaii 626 (1923). In that case, the dependent parents of an adult child sought damages for loss of support arising out of the death of the child in an accident. The court stated:

An action to recover damages for the death of a relative was not known to the common law . . .

The court went on to point out that in 1892 the Territory, then a kingdom, had enacted what is now Sec. 1, R.L.H. 1945. The court stated:

The rule of the common law applicable to the question involved herein, not having been altered by the Constitution or laws of the United States or (until the enactment of Act 245, S.L. 1923) by the laws of this Territory, must therefore be our guide in the instant case unless it can be said that a contrary rule of law has been "fixed by Hawaiian judicial precedent, or established by Hawaiian usage".

The court pointed out that in 1860 in the case of *Kake v. Horton*, 2 Hawaii 209 (1860), it had allowed a widow to recover damages for the wrongful death of her husband under Section 14 of the Civil Code 1859 which permitted judges to apply "necessary remedies to evils not specifically contemplated by law". That provision had been repealed by Act 57, S. L. 1892, which instead, by what is now Section 1, R.L.H. 1945, adopted the common law. The court then referred to *Ferreira v. Hon. R. T. & L. Co.*, 16 Hawaii 615 (1905), which had followed the *Kake* decision, and said:

The cases of *Kake v. Horton* and *Ferreira v. Hon. R. T. & L. Co.* above cited are undoubtedly authority for the proposition that, as "fixed by Hawaiian judicial precedent" the common law rule denying a right of action to a widow for the wrongful death of her husband or a right of action to a father for the wrongful death of his minor son, has been abrogated in this jurisdiction. But, in conceding that the cases cited go to such lengths, it does not follow that, in the case of the death of an adult, a person dependent upon the deceased, even if such dependent be the father or mother of deceased, has, in the absence of statute, a right of action against the person causing the death of deceased. In *Kake v. Horton* the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant. The same may be said of the *Ferreira* case for, since by law a father is entitled to the earnings of his son during the son's minority, a right of action may be maintained by the father against one who, by causing the son's death, deprives the father of that legal right. Where, however, no legal right is infringed, no right of action may be maintained.

It is obvious from the decision in *Hall v. Kennedy*, supra, and from the subsequent death cases in Hawaii such as *Gabriel v. Margah*, 37 Hawaii 571 (1947), and *Young v. H. C. & D. Co.*, 34 Hawaii 426 (1938), that

the Hawaiian departure from the common law in *Kake v. Horton*, 2 Hawaii 209 (1860), was confined to cases involving wrongful death where the party suing could claim damage directly resulting from the deprivation of some legal relationship. After the adoption of the common law, the Hawaiian courts refused to broaden the *Kake* rule to include other classes of cases.

Moreover, it is apparent from the language in the opinion in the *Kake* case itself that, had it not been a case where the death of the husband had resulted from the injury, an action would not have been allowed, for the court said:

We are of the opinion that much of the law read by the learned counsel for defendant, as well as a great part of their argument, is inapplicable to the question at issue.

They treat the case as if this was an action of trespass brought by the plaintiff to recover damages for an assault and battery, committed on her deceased husband, Charlie Pihaole; whereas, as as we understand the matter, it is an entirely different thing, being an action on the case, to recover for consequential damage resulting to the plaintiff by reason of the death of her late husband, which she alleges to have been caused by the wrongful act of the defendant, Horton. (Italics supplied) (p. 210) .

From time to time, the Hawaiian Legislature has broadened the remedies allowed in wrongful death cases. Thus, as pointed out in *Hall v. Kennedy*, 27 Hawaii 626 (1923), a statute had been enacted, by the time that case was decided in the Supreme Court,

which allowed actual dependents to recover in death cases. This statute is now Section 10486 R.L.H. 1945. Act 205, S. L. 1955, effective May 27, 1955, extended the damage recoverable in a statutory death action to include pecuniary injury by reason of losses in the nature of those sought in the present case. No attempt, however, was made in the statute to allow recovery of damages for such losses in cases where death did not result from the injury.

The Court below also stated:

The foregoing review indicates very clearly that Hawaii intends to protect all legal interests of the family. (R. 15, 16)

However, a review of the Hawaiian cases cited by the Court below, *Kake v. Horton*, 2 Hawaii 209 (1860); *Ferreira v. Hon. R. T. & L. Co.*, 16 Hawaii 615 (1905); *Hall v. Kennedy*, supra; *Globe Indemnity Co. v. Araki*, 32 Hawaii 153 (1931); *Young v. H. C. & D. Co.*, 34 Hawaii 426 (1938); *Gabriel v. Margah*, 37 Hawaii 571 (1947); *Ginoza v. Takai Elec. Co.*, 40 Hawaii 691 (1955), and *Enos v. Hono. Motor Coach Co.*, 34 Hawaii 5 (1936), does not show any disposition on the part of the Hawaiian court to extend the principle adopted in the *Kake* case beyond the limitations previously set forth. On the contrary, the decision in *Hall v. Kennedy*, supra, expressly holds that in obedience to Section 1, R.L.H. 1945, that principle would not be so extended.

A review of the Hawaiian statutes cited by the court below, Act. 245 S.L. 1923 (now Section 10486, R.L.H. 1945), Act 206, S.L.H. 1953 (providing for

the survival of tort actions), Act 205, S.L.H. 1955 (allowing recovery of damages in a statutory death action to the same extent as to recovery allowed under *Kake v. Horton*, supra), does not reveal that any of those statutes can be construed so as to allow the claim here sought to be asserted. On the contrary, they all deal with situations involving the death of the person injured in the accident.

Thus, just as in *Hall*, supra, we have a situation where the common law does not recognize a right to relief and where neither Hawaiian judicial precedent nor statutes can be construed to uphold such a right. It is therefore clear that the substantive law of Hawaii will deny the claim for relief here asserted. A very similar case was that decided by the Florida court in *Ripley v. Ewell*, 61 S. 2d 420 (Fla. 1952), where a wife sought to recover for damages arising out of negligent injury to her husband, although the husband did not die as a result of the accident. Florida had a statute similar to Hawaii's Section 1, and the Florida court finding that the claim for relief was not accepted at the common law, refused to allow it in Florida.

Not only is the decision below contrary to Section 1, R.L.H. 1945, but the reasons asserted in the opinion of the lower court as the logical basis for its departure from common law will not withstand analysis.

The court below held, reasoning by analogy from *Hitaffer*, that a child should be allowed to recover since where a parent is negligently injured, because the child does suffer by deprivation of the care, com-

fort and companionship of its parent. Apparently, both the decision below and that in *Hitafter* were based implicitly, as was *Daily* expressly upon the doctrine *ubi jus ibi remedium*. The difficulty is that that doctrine is inapplicable, for *jus* means a legal right, and as previously pointed out, a child has no legal right, under Section 12264, R.L.H. 1945 to the personal care, comfort and companionship of a parent. It is true that the complaint here contained allegations of loss of support, but any loss of support is, of course, only a consequence of injury to the parent and, since the parent can, and here did (R. 20, 21), recover for all the injuries which he or she has suffered, the allegations of loss of support do not make the claim for relief a good one. *Blair v. Seitner Dry Goods*, 184 Mich. 304, 151 N. W. 724 (1915); *Feneff v. New York Cent. & H. R. R. Co.*, 203 Mass. 278, 89 N. E. 436 (1909).

The loss by a child of the parent's care, comfort and companionship is no different whether the child is a minor or of age. An equally great loss may be sustained by a grandchild, a nephew, a more distant relative, a close personal friend, or, in Hawaii, a *keiki hanai* (a foster child, not legally adopted), all depending upon the circumstances of the case.

No logical distinction can be made between the case of the child and that of another to whom the injured person merely stood in point of fact *in loco parentis*. Of course, it can be argued that in one case there is a legal parent-child relationship, while in the other there is not. However, to attempt to draw a line

because of the parent-child relationship between a child and a grandchild living in the home of its grandparents, or a keiki hanai or even an old friend deprived of the daily companionship of the injured person, is merely to create a new legal fiction.

Aside from the fact that the decision below is contrary to the common law, to the Hawaiian judicial precedents and statutes, and is without logical justification, consideration should also be given to the practical consequences of that decision. If the claims for relief here sought were recognized, every settlement of a tort claim where the injury arose within the last twenty-two years and nine months (Sections 10427, 10430, 12261, R.L.H. 1945) would now be in doubt, for if the settlement were made only with the person injured, others, including minor children within two years after their majority, might come in and prosecute actions on their own behalf. In the future, no such claim could be settled without securing a release from the spouse and from the guardian of all the children. This would mean that in every case where a tort claimant was a parent and had minor children the claimant would have to have a guardian ad litem appointed for his children and meet the approval of the court before his case could be settled. The resulting burden upon the courts and the discomfiture of the tort claimants themselves would be, to say the least, substantial.

CONCLUSION.

For the reasons set forth above, the judgment below should be reversed.

Dated, Honolulu, Hawaii,
April 11, 1956.

Respectfully submitted,

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Appellant.*

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

(Appendix Follows.)



Appendix.



Appendix

COMMON LAW, STATUTES AND DEPOSITORIES.

Sec. 1, R.L.H. 1945.

Common law applies except when. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *provided*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory.

LIMITATION OF ACTIONS

Personal Actions.

Sec. 10427, R.L.H. 1945.

Damage to persons or property. Actions for the recovery of compensation for damages or injury to persons or property must be instituted within two years after the cause of action accrued, and not after.

TORT ACTIONS

Parties: Death by Wrongful Act.

Sec. 10486, R.L.H. 1945.

Action by dependent, when. When the death of a person is caused by the wrongful act or neglect of

another, any person who was wholly or partly dependent upon such decedent may maintain an action for damages against the person causing the death, or if such person so liable was then employed by another person who is responsible for his conduct, then also against such employer. Where there is more than one person wholly or partly dependent upon such decedent, any action that may be brought shall be brought by all of such dependents or by one or more of such dependents for the benefit of all the dependents, but only one action may be brought and one recovery had. In every action under this section such damages may be given as under all the circumstances may be just and the trial court shall apportion the damages given among all the dependents. In the action the court shall cause notice to be given of the pendency thereof to all known dependents who have not joined therein. Such action must be commenced within two years after the injury which caused the death; *provided*, however, that nothing in this section shall be construed as authorizing any action to be maintained hereunder against the employer of such decedent in any case where any dependent of the decedent has a remedy for compensation under the provisions of Chapter 77.

Children.

Sec. 12261, R.L.H. 1945.

Age of majority. All persons, whether male or female, residing in the Territory, who shall have attained the age of twenty years, shall be regarded as of legal age and their period of minority to have ceased.

Sec. 12264, R.L.H. 1945.

Parents' control and duties; binding out of children by judge. Parents, or, in case they be both dead, guardians, legally appointed, shall have control over the actions, the conduct and the education of their children during their minority; they shall have the right, at all times, to recover possession of their children by habeas corpus, and to chastise them moderately for their good; and it shall be the duty of all parents and guardians to set a good example before their children; to provide, to the best of their ability, for their support and education; to see that they are instructed in a knowledge of religion; to use their best endeavors to keep them from idleness and vice of all kinds; and to inculcate upon them habits of industry, economy and loyalty; and it shall be lawful for any judge of any circuit court, on a complaint being laid before him against any parent, that he or she is encouraging their children in ignorance and vice, to summon such parent before him; and, upon its being proved to his satisfaction, to bind out such children during their minority to some person of good moral character to be well supported, trained to good habits, and taught at least the rudiments of knowledge. Act. 206, S.L. 1953.

Section 1. Chapter 221 of the Revised Laws of Hawaii 1945 is hereby amended by adding new sections 10494, 10495 and 10496, to read as follows:

“Sec. 10494. *Actions which survive death of wrongdoer or other person liable.* All rights of action arising out of physical injury to the per-

son and rights of action arising out of the death of a person by wrongful act in favor of his dependents or in favor of persons toward whom the deceased occupied the relationship of husband, wife, parent or minor child, shall survive notwithstanding the death of the wrongdoer or any other person who may be liable for damages for such physical injury or death.

“Sec. 10495. *Death of defendant, no abatement of action.* In any case where the wrongdoer or other person who may be liable for damages for physical injury or death to the persons enumerated in section 10494 shall die after action shall have been instituted against him therefor, the action shall not abate, but may be continued against the executor or administrator of his estate in accordance with the provisions of chapter 204 of the Revised Laws of Hawaii 1945.

“Sec. 10496. *Death of wrongdoer or other person liable prior to suit, time for bringing action against estate.* In any case where the wrongdoer or other person who may be liable for damages for physical injury or death to the persons enumerated in section 10494 shall die before an action has been brought against him, such action may be brought against the executor or administrator of his estate; *provided*, however, that every such action shall be instituted within the time prescribed by law for filing of claims by creditors of the deceased in the probate proceedings and within two years of the act which caused

the physical injury or death, whichever shall be earlier, or be forever barred.”

Act. 205, S.L. 1955.

Section 1. Section 10486 of the Revised Laws of Hawaii 1945 is hereby amended to read as follows:

“Sec. 10486. Death by wrongful act. When the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, the deceased’s legal representative, or any of the persons hereinafter enumerated, may maintain an action against the person or corporation causing the death or against such person or corporation responsible for such death, on behalf of the persons hereinafter enumerated.

In any such action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (a) loss of society, companionship, comfort, consortium or protection, (b) loss of marital care, attention, advice or counsel, (c) loss of filial care or attention or (d) loss of parental care, training, guidance or education suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damage recovered

under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. If an action be brought pursuant to this section and a separate action brought pursuant to section 10497, such actions may be consolidated for trial on the motion of any interested party, and a separate verdict, report or decision may be rendered as to each right of action. Any action brought under this section shall be commenced within two years from the date of death of such injured person."

Section 2. Chapter 221 of the Revised Laws of Hawaii 1945 is hereby amended by adding a new section 10497 thereto to read as follows:

"Sec. 10497. Survival of actions. A cause of action arising out of a wrongful act, neglect or default, except actions for defamation and malicious prosecution, shall not abate by reason of the death of the injured person. Such action shall survive in favor of the legal representative of such person and any damage recovered shall form part of the estate of the deceased."

Section 3. Sections 10494, 10495 and 10496, as enacted by Act 206 of the Session Laws of Hawaii 1953, are hereby amended to read as follows:

"Sec. 10494. Actions which survive death of wrongdoer or other person liable. All rights of action arising out of physical injury to the person or out of the death of a person as provided by section 10486, shall survive, notwithstanding

the death of the wrongdoer or any other persons who may be liable for damages for such physical injury or death.

Sec. 10495. Death of defendant, no abatement of action. In any case where the wrongdoer or other person who may be liable for damages for physical injury or death as provided by section 10486 shall die after action shall have been instituted against him therefor, the action shall not abate, but may be continued against the legal representative of his estate in accordance of the provisions of chapter 204 of the Revised Laws of Hawaii 1945.

Sec. 10496. Death of wrongdoer or other person liable prior to suit, time for commencing action against the estate. In any case where the wrongdoer or other person who may be liable for damages for physical injury or death as provided in section 10486 shall die before an action has been brought against him, such action may be brought against the legal representative of his estate; provided, however, that every such action shall be instituted within the time prescribed by law for filing of claims by creditors of the deceased in the probate proceeding or within two years after the date of physical injury in all other cases, whichever shall be earlier.”

LIMITATION OF ACTIONS

Personal Actions.

Sec. 10430, R.L.H. 1945.

Infancy, insanity, imprisonment. If any person entitled to bring any action in part 1 of this chapter specified (excepting actions against the high sheriff, sheriffs, or other officers) shall, at the time the cause of action accrued be, either,

1. Within the age of twenty years; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life;

Such persons shall be at liberty to bring such actions within the respective times in said part 1 limited, after such disability is removed.

No. 15,019

IN THE
United States Court of Appeals
For the Ninth Circuit

JAMES MEREDITH,

Appellant,

vs.

RICHARD MEREDITH SCRUGGS, CAROL
ELIZABETH SCRUGGS, ATLEE GAIL
SCRUGGS, MERI-JO ABRAMS and LOUIS
EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court
for the District of Hawaii.

BRIEF FOR APPELLEES.

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Appellees.

Upon Appeal from the United States District Court
for the District of Hawaii.

BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

Appellees accept appellant's jurisdictional statement.

STATEMENT OF THE CASE.

Appellees do not controvert the Statement of the Case made by Appellant in his brief.

SUMMARY OF ARGUMENT.

Regardless of the rule in other jurisdictions, under the common law of Hawaii a cause of action exists in favor of appellees for pecuniary loss resulting from the deprivation of support, loss of care, attention, acts of kindness, comfort, solace of the society of their mother, her counsel and advice.

The numerous cases cited by Appellant in support of his Argument (1) (Appellant's Brief, pp. 4-11) are inapplicable to this case, and are of absolutely no aid in determining the issues of this case. The Court of Hawaii held in *Gabriel v. Margah* (1947), 37 Hawaii 571:

“Whatever may be the juridicial conclusions in other jurisdictions of the right to recover damages for the deprivation of those incidents of the legal relations of the husband and wife or parent and child which are difficult of exact estimation and to which no standard of value is applicable, such as deprivation of a wife of the society, comfort and fellowship of her husband, or the deprivation of parents of acts of kindness and attention, association, comfort and presence of their deceased minor child, we are confined to, and the solution of the questions here involved is governed by, the measure of damages of the cause of action adopted in the Kake case and the necessary and reasonable implications thereof.”

The learned trial judge followed the well-established law created by the Supreme Court of the Kingdom of Hawaii in 1860.

ARGUMENT.

(1) THE COMMON LAW OF HAWAII RECOGNIZES THE CLAIM HERE ASSERTED.

In *Kake v. Horton*, 2 Hawaii 209 (1860), the Court held that a wife can maintain a cause of action to recover for consequential damages resulting to her by reason of the death of her husband caused by the wrongful act of the defendant, and she was allowed to recover for loss of support and the deprivation of the society, comfort, and fellowship of her husband. The Court held (at p. 213):

“The principle which we now recognize will become, by judicial adoption, a valuable part of the common law . . .”

In extending the common law of Hawaii in *Ferreira v. Honolulu R.T. & L. Co.*, 16 Hawaii 615 (1905), the Court found:

“It is true that in the cases cited the actions were by widows for the deaths of their husbands, but the reasoning upon which the decisions were based is equally applicable to actions by parents for the deaths of their children.” (at 628)

The Hawaiian courts recognized the existence of a cause of action under the common law of Hawaii where a recognized legal duty within the family relationship existing between the party bringing the action and the injured party is infringed by the wrongful act of another. Thus, the Court held in *Hall v. Kennedy*, 27 Hawaii 626 (1923), that a parent could not maintain an action to recover damages for the death of an adult child, even though such parent may

have been dependent upon the adult child, since there was no legal right belonging to the parent which was infringed upon by reason of the wrongful act of the tort-feasor. The Court commented:

“In *Kake v. Horton*, the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant. The same may be said of the *Ferreira* case for, since by law a father is entitled to the earnings of his son during the son’s minority, a right of action may be maintained by the father against one who, by causing the son’s death, deprives the father of that legal right. Where, however, no legal right is infringed, no right of action may be maintained. Upon reaching majority a child is under no legal duty of supporting his parent and the parent has no legal claim upon the earnings of his child after majority. In the instant case it is asserted that the deceased was the sole support of plaintiffs, but no legal duty or obligation was on deceased to support plaintiffs.” (at p. 629, 630)

Here appellees interpose that it is obvious Hawaii intends to protect all legal interests and incidents of the family, for promptly in 1923, the same year the *Hall* case, *supra*, was decided, the Legislature enacted House Bill 395 which afforded plaintiffs such as in the *Hall* case a cause of action based upon dependency. The judiciary committee of the senate of this session

of the legislature reported, and the Court held in *Gabriel v. Margah*, supra, at page 579:

“This Bill enlarges the right of suit and recovery for death by wrongful act. . . . It enlarges the common law recovery which we believe to be too limited.” (Sen. Journal Hawaii, 12 Legis. Reg. Sess. 1923, p. 977.)

And under the most recent case brought under this Act (as amended and then in effect), *Ginoza v. Takai Elec. Co.*, (1955), 40 Haw. 691, the Court permitted recovery by the wife for loss of support and wellbeing, and allowed the children to recover for the loss of support, maintenance, education, nurture, care and training, the same incidents recoverable under the common law of Hawaii hereinbefore set forth. Chief Justice Towse said in that case, at page 709:

“That damages may be awarded for such loss is settled in this jurisdiction.”

The 1955 Legislature of Hawaii, by Act 205, effective May 27, 1955, further amended the statutory action incorporating specific provisions permitting recovery for pecuniary injury and loss of love and affection, including loss of society, companionship, comfort, consortium or protection, loss of marital care, attention, advice or counsel, loss of filial care or attention, or loss of parental care, training, guidance or education, suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person.

And while in the *Hall* case, *supra*, decided in 1923, the Court held that where no legal right is infringed, no right of action could be maintained under the common law of Hawaii, had the Hall plaintiffs sustained loss subsequent to the enactment of Act 66, Session Laws of Hawaii 1933, reading in part:

“The adult children of any person who for any reason is incapable of self-support shall be liable, to the extent of their financial ability, for the support of such person. . . .”

they would have undoubtedly had an action under the common law of Hawaii.

In 1947, in ruling in *Gabriel v. Margah*, 37 Hawaii 571, which is the latest word on the Hawaiian common-law action, the Court held:

“... the cause of the action adopted in the *Kake* case and applied in that case to the relation of husband and wife, and in the *Ferreira* case to the relation of parent and minor child, is based upon the statutory legal incidents of the relation pre-existing between the plaintiff and the deceased and the reciprocal legal rights and duties of the parties attached to such relation.

The *reciprocal* rights and duties attached to the respective relations of husband and wife and of parent and minor child . . . have, since the decision in the *Kake* case, remained substantially the same. . . .”

Of course, the cases decided under the common law of Hawaii involved death. However, the cause of action adopted in the *Kake* case, and extended in the

subsequent cases heretofore discussed, was not based on the requirement of a total loss. It was based upon an invasion of a legal right, and recovery may be had for a temporary loss, as well as for permanent loss, depending on the facts of each particular case. Even under the English common law a husband could recover of the tort-feasor for the loss of his wife's society and the distress of mind he had suffered on her account by reason of injuries sustained by her. In *Baker v. Bolton, et al.*, 1 Campbell's Rep. 494, in an action against the proprietors of a stage coach in which the plaintiff and his wife were travelling when it overturned, plaintiff himself was much bruised and his wife was so severely hurt that she died about a month thereafter; the jury was instructed that the husband could recover for the bruises which plaintiff himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account, from the time of the accident until the moment of her dissolution. Under the English common law, the husband could not, however, recover for his damages as a result of her death.

The common law of Hawaii, as distinguished from the common law of England, affords such widowers a cause of action, which has been extended, in the cases hereinbefore cited, to include minor children. As heretofore shown, Hawaiian cases have recognized the *reciprocal* rights and duties attached to the respective relations of husband and wife and of parent and minor child, the invasion of which gives rise to a cause of action.

In the case at bar, there are, contrary to Appellant's statement appearing on page 17 of his brief, legal rights infringed upon. The Appellees are entitled, under Section 12264 (set forth on page iii of the Appendix to Appellant's Brief), to have their mother "set a good example before" them, provide them with support and education, instruct them in a knowledge of religion, keep them from idleness and vice of all kinds, inculcate them with habits of industry, economy and loyalty. In ruling in the *Gabriel* case, *supra*, on the statutory legal rights and duties attached to the relations of parent and minor child, the Court found acts of kindness and attention, among other things, to be part of the *reciprocal* rights and duties attached to such relation.

Indeed, the specific loss of these reciprocal rights are now spelled out in the statutes of Hawaii, particularly by the adoption of Act 205, S.L. 1955, to include the pecuniary injury and loss of love and affection, including the loss of society, companionship, comfort, consortium or protection, loss of marital care, attention, advice or counsel, loss of filial care or attention, and loss of parental care, training, guidance or education.

Appellees allege in their Complaint (R. p. 5) that the injuries to their mother resulted in "loss to plaintiffs of support, maintenance, education, nurture, care, and training which their mother would have given them during said period, all to their damage in the sum of \$106,000.00." Further, that they "were partially deprived of the association, care, attention, acts

of kindness and the comfort and solace of her society;" that due to the partial disability to their mother caused by the injuries to her, appellees "will continue to be partially deprived of the association, care, attention, acts of kindness and the comfort and solace of her society, by reason of the permanent nature of said disability to their mother." (R. p. 5, para. IV.)

Section 10485, respecting tort liability, provides:

"Except as otherwise provided, all persons residing or being in the *Territory* shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their wives, children under majority, or wards, by such offending party, or by his wife, or his child under majority, or by his command, or by his animals, domitae or ferae naturae; and the party aggrieved may prosecute therefor in the proper courts."

Except for the italicized amendment the law was the same Section 1125, Civil Code 1859, under which the *Kake* case was decided. Under this same statute, Appellees contend that Appellant (the offending party) is personally responsible to them for the pecuniary injury or loss occasioned them, be it termed "direct or consequential".

Commenting upon this same statute of 1859 then in effect, the Court said in the *Kake* case:

"They (counsel for defendant) treat the case as if this was an action of trespass brought by the plaintiff to recover damages for an assault and battery, committed on her deceased husband,

Charlie Pihaole; whereas, as we understand the matter, it is an entirely different thing, being *an action on the case, to recover for consequential damage resulting to the plaintiff* by reason of the death of her late husband, which she alleges to have been caused by the wrongful act of the defendant, Horton.” (at p. 210)

Appellant urges that the common law of Hawaii applies only in cases of death. Let us assume that a sole surviving parent is rendered not only permanently and totally disabled according to the most competent medical prognosis, but also hopelessly incompetent, to a point where he does not even recognize his own minor children. Will the minor children be deprived of a cause of action, despite the liberal judicial history of Hawaii, simply because their parent was not killed, though he be in a state of living death? Appellees urge that the common law of Hawaii is based on the invasion of the legal right, and is not dependent on death. Pecuniary loss of the legal right to receive support and education, nurture, care, training, acts of kindness and the comfort and solace of society, exists whether or not there be death, and it is that loss which is measured under the circumstances of the instant case. Of course, if death should be the result, the losses would be permanent and greater, and, accordingly, a judgment should naturally be greater.

The learned trial judge said in his “Ruling on Motion to Dismiss” (R. 15):

“The decided cases to date to be sure have all been wrongful death cases. However, the cause of

action is not founded upon the degree or quantity of the loss. Rather is it premised upon an invasion of a right. So it is that both logic and the law agree that redress may be had for a temporary impairment as well as for the total destruction of a right incident to the family relationship.”

Appellees repeat the Court’s comment in the *Hall* case, *supra*:

“In *Kake v. Horton*, the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant.”

As has been shown, and will be shown in Argument (2) following, the Hawaiian common law as expounded in the *Kake* case is the law in Hawaii, regardless of what it might be in other jurisdictions. In other words, in the *Kake* case, “the legal right of the wife for such support was infringed upon by the wrongful act of the defendant”, as the Court found in the *Hall* case. That right of the wife for such support would have been infringed upon even if her husband was not *killed*, and she would still have been permitted to recover from defendants. Likewise, as the Court continued in the *Hall* case:

“The same may be said of the *Ferreira* case for, since by law a father is entitled to the earnings of his son during the son’s minority, a right of

action may be maintained by the father against one who, by causing the son's death, deprives the father of that legal right."

Since the father was entitled to the earnings of his son during the son's minority, a right of action could be maintained by the father against the tort-feasor who, by his act deprives the father of that legal right. That legal right is infringed whether there is death or injury not resulting in death. An injury to a lesser degree is a deprivation in a proportionate degree. It is manifest that the infringement of the legal right is what gives rise to the cause of action, and not a requirement that there be death as Appellant contends.

The Court in *Hall v. Kennedy*, supra, made it clear that where a legal right is infringed, a right of action may be maintained. A legal right is infringed whether there is death or injury not resulting in death. And, so the Court said in the *Hall* case:

"Where, however, no legal right is infringed, no right of action may be maintained."

**(2) THE COURT BELOW FOLLOWED THE COMMON LAW
AS REQUIRED BY HAWAIIAN STATUTE.**

As heretofore set forth in our Argument (1), the common law of Hawaii, regardless of what it might be elsewhere, recognizes a claim for relief which the learned judge of the District Court upheld.

The provision of Section 1, Revised Laws of Hawaii 1945, applicable to this case is not merely that portion

set forth by Appellant on page 11 of his brief. As applicable to this case, said section reads, in part:

“Common law applies except when. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, *except as . . . fixed by Hawaiian judicial precedent, or established by Hawaiian usage; . . .*” (as enacted in 1900 at the time of annexation of the Republic of Hawaii as a Territory of the United States.)

In *Kake v. Horton*, 2 Hawaii 209 (1860), the plaintiff, widow of Charlie Pihaole who came to his death by the alleged act of the defendant, brought the action to recover damages for the loss thus sustained by her. The question before the Court was whether an action could be maintained by the widow. The Court could have followed the English common law, under which the action would not lie, as urged by the defendant. However, the Court held:

“We do not regard the Common Law of England as being in force here eo nomine and as a whole.”

Rejecting the English common law on the subject, the Court proceeded to hold that the action can be maintained under the construction given to certain provisions of the Hawaiian statutes, particularly Section 1116 and Section 14 of the Civil Code of 1859. At page 212, the Court held:

“... Judges are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good

conscience. And, to decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries. We think reason and natural justice are clearly in favor of permitting an action to be maintained, upon the grounds relied upon in this case, and upon a resort, for light, to the laws of those countries, to whose authority and opinions we yield the highest veneration, we find that the old harsh rule, which had its origin in feudal times, has been superseded by liberal statutory provisions, more in accordance with justice and with the sentiments and circumstances of an enlightened age. *As we are not fettered by the English common law rule on the subject*, no legislative enactment is required to remove that obstacle to the maintenance of an action like the present in a Hawaiian Court, and we think it ought to be permitted, as being consonant with natural law and reason, as well as with the laws of civilized countries."

In other words, the English common law on the subject was specifically rejected and was never the law in Hawaii. And while the limitations placed on the Hawaiian common law by *Hall v. Kennedy*, supra, may have been correct, as cited by appellant on page 13 of his brief, the statement in the ruling in the *Hall* case:

"The cases of *Kake v. Horton* and *Ferreira v. Hon. R. T. & L. Co.* above cited are undoubtedly authority for the proposition that, as 'fixed by Hawaiian judicial precedent' the common law rule denying a right of action to a widow for the

wrongful death of her husband or a right of action to a father for the wrongful death of his minor son, has been *abrogated* in this jurisdiction. . . .”

is incorrect to the extent that the English common law rule on the subject was never “abrogated”, in the strict sense of the word, since it was never the law in Hawaii. (The quotation appearing on page 13 of Appellant’s Brief is from *Hall v. Kennedy*, 27 Haw. 626, and not the *Ferreira* case as appellant notes.) While under the English common law a husband could recover for the loss of his wife’s society and the distress of mind he had suffered on her account by reason of injuries sustained by her, from the time of the injury until the moment of her dissolution (see *Baker v. Bolton*, *supra*), he could not complain of her death resulting from such injuries. The Court took cognizance of the *Baker* case in ruling on the *Kake* case. Can it be said that the Court in *Kake v. Horton*, *supra*, after finding “that the old harsh rule, which had its origin in feudal times, has been superseded by liberal statutory provisions, more in accordance with justice and with the sentiments and circumstances of an enlightened age,” permitted a cause of action for the death, and then stepped back into feudal times to disallow recovery to a husband for the loss of his wife’s society from the time of injury until the moment of her dissolution? Yet this is the construction appellant urges upon this learned Court.

Appellant urges that Section 14 of the Civil Code, 1859, which permitted judges to apply “necessary re-

medies to evils not specifically contemplated by law” had been repealed by Act 57, S.L. 1892, by what is now Section 1, Revised Laws of Hawaii 1945. As heretofore cited, Section 1 declared the common law of England, as ascertained by English and American decisions, to be the common law of the Territory of Hawaii, “*except as fixed by Hawaiian judicial precedent, or established by Hawaiian usage.*” The Hawaiian common law on the subject matter of this case, was fixed by the precedent of the *Kake* case, and has been established by Hawaiian usage, as shown in Argument (1) of this Brief for Appellees, and is the law in Hawaii—it is not the English common law, or that ascertained by American decisions, but a unique law which Appellees refer to herein as the Hawaiian common law.

In re Estate of Banning (1894), 9 Haw. 453, at 461 and 462, the Court rejected the common law of England that forbade the investment of trust funds in any securities except real estate mortgages and public bonds, and announced the more liberal rule (also the rule in several states) that no statutory provisions, limiting the investment of trust funds to specific securities, existed in Hawaii, and held that it would go no further than to hold that the trustee must act with honesty, prudence, faithfulness, and exercise of sound discretion in placing trust funds for investment.

In re Guardianship of Anna T. K. Parker (1902), 14 Hawaii 347, the Appellant therein made the same contention Appellant in the case at bar urges. In the *Parker* case, it was contended that the decision in the

Banning case, *supra*, was not binding since that decision was rendered prior to the annexation of the Hawaiian Islands to the United States and none of the decisions of the Court rendered before annexation were controlling except those construing statutes continued in force by the Organic Act or such as may have become rules of property. The Court held:

“This is not the view that this Court as now constituted has taken of those decisions. Nor is it the view of the *United States District Court for the Territory or the United States Circuit Court of Appeals for the Ninth Circuit*. (See *The Schooner Robert Lewers Co. v. Kamaka Kekauoha*, 114 Fed. 849). It was held by the former court, in the case last cited at nisi prius and by the latter court on appeal that a decision of the Supreme Court of the islands rendered in 1860, contrary to the common law, (sustaining an action by the widow for damages for the death of her husband, no such action could be maintained at common law) was a part of the law of the Territory of Hawaii. What the court of appeal said in that case is pertinent here.

“ ‘As will have been observed, the Supreme Court there expressly declared: “The principle which we now recognize will become, by judicial adoption, a valuable part of the common law of this kingdom.” Such judicial modification of the common law the legislature of Hawaii has expressly sanctioned and ratified by section 1109 of Ballou’s compilation of the laws of that country, which, as has been seen, was in turn sanctioned and ratified by Section 1 of the Act of Congress of April 30, 1900, above set out. There was there-

fore statutory authority for the right asserted and sustained by the court below.' " (p. 854)

And so the Court held in the *Parker* case that the rule announced in the *Banning* case has been the law of Hawaii on that subject since the date of the decision (April 25, 1894), and would continue such until overruled by the Supreme Court of Hawaii or until a different rule is made by legislative enactment. Appellees herein urge that the rule announced in the *Kake* case, *supra*, and extended in the cases hereinbefore cited, is the rule applicable in the case at bar, and that the learned judge of the Court below followed the common law as required by Section 1, Revised Laws of Hawaii 1945.

Appellant states, at page 17 of his brief:

"It is true that the complaint here contained allegations of loss of support, but any loss of support is, of course, only a consequence of injury to the parent and, since the parent can, and here did (R. 20, 21), recover for all the injuries which he or she suffered, the allegations of loss of support do not make the claim for relief a good one."

The jury in the case at bar returned general verdicts without specifying the amounts awarded for appellees' specific losses or for their mother's specific losses. There is no manner in which it can be mathematically ascertained that the jury awarded their mother a fixed amount for her loss of income, since under the evidence of the case (not a part of the record in this appeal), and under the pleadings, the

jury would have been warranted in returning a verdict in favor of the mother substantially in excess of \$40,000.00 for her loss of income alone. Appellees do not question that the jury allowed their mother certain special damages for her medical expenses, and still other damages for her pain and suffering, both present and future, which would reduce the amount awarded for loss of her income to something substantially less than the verdict awarded her. As stated in Appellant's brief, the action by the mother and the action of appellees were consolidated for trial (R. 27). The jury had the issues of both cases before them, and under our system of jurisprudence, until the contrary is shown, we must assume that the jury considered all the facts and the law as given by the Court. The jury in this case may have found the mother entitled to \$10,000 for her loss of income, but reduced the award to her by \$5,000, and awarded the difference to appellees as part of the verdict to them. There is no indication whatsoever that the jury awarded double damages in finding the mother's loss of income at a fixed amount, and then awarded the same amount to appellees as loss of support. The instructions of the learned Judge of the lower Court are not being attacked on this appeal, and it must be presumed that the jury was properly instructed as to the awards for loss of income and loss of support. Appellant implies that the mother in this case was fully compensated for her loss of income. Perhaps the jury, although finding that there was loss of income on her part, awarded her nothing and made the award to the children instead as loss of support.

However minor, such a flagrant misstatement by appellant should not be left unanswered.

In this class of case, the Hawaiian Court has held that:

“While . . . pecuniary damages are the limit of recovery, they include compensation for losses which are difficult of exact estimation and to which no standard of value may be applied and the damages for which are and necessarily must be left to the sound discretion of the trier of the facts.”

Gabriel v. Margah (1947), 37 Hawaii 571.

The appellant's argument of practical consequences of “doubt” and “discomfiture” to the wrongdoer respecting settlements of tort claims are ever present, and the Courts are constantly burdened with decisions resolving the doubts and discomfitures of wrongdoers—that is the routine business of courts of law. These arguments, and others, which are averted to in 83 Penn. Law Review, 267-277, and satisfactorily disposed of in 20 Cornell Law Quarterly, 255-257, issue a challenge to the Courts to recognize the valid claim of a child who is wronged by the denial of his mother's support, love and care which has been acknowledged in England and America as one of the best foundations for his entire life's success and happiness. These so-called practical difficulties are mere subterfuge, as the *real issue* posed by this appeal is whether a child has a cause of action for the injury to his rights in his relationship with his mother, as distinguished from the *false issue* whether the wrong-

doer should be inconvenienced by “discomfiture” or “doubt” in the wrong done to a child.

CONCLUSION.

For the reasons set forth above, the judgment below should be affirmed.

Dated, Honolulu, Hawaii,
May 11, 1956.

Respectfully submitted,
ARTHUR K. TRASK,
Counsel for Appellees.

(Appendix Follows.)



Appendix.



Appendix

STATUTES

Sec. 14, Civil Code of 1859.

The Judges have equitable as well as legal jurisdiction, and in all civil matters, where there is no express law, they are bound to proceed and decide according to equity, applying necessary remedies to evils that are not specifically contemplated by law, and conserving the cause of morals and good conscience. To decide equitably, an appeal is to be made to natural law and reason, or to received usage, and resort may also be had to the laws and usages of other countries.

Sec. 1, R.L.H. 1945.

Common law applies except when. The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the Territory.

CHILDREN

Sec. 12264, R.L.H. 1945.

Parents' control and duties; binding out of children by judge. Parents, or, in case they be both dead, guar-

dians, legally appointed, shall have control over the actions, the conduct and the education of their children during their minority; they shall have the right at all times, to recover possession of their children by habeas corpus, and to chastise them moderately for their good; and it shall be the duty of all parents and guardians to set a good example before their children; to provide, to the best of their ability, for their support and education; to see that they are instructed in a knowledge of religion; to use their best endeavors to keep them from idleness and vice of all kinds; and to inculcate upon them habits of industry, economy and loyalty; and it shall be lawful for any judge of any circuit court, on a complaint being laid before him against any parent, that he or she is encouraging their children in ignorance and vice, to summon such parent before him; and, upon its being proved to his satisfaction, to bind out such children during their minority to some person of good moral character, to be well supported, trained to good habits, and taught at least the rudiments of knowledge.

DUTY OF ADULT CHILDREN

Sec. 3044A, R.L.H. 1925 (now Sec. 12290, R.L.H. 1945)

Support of indigent parents. The adult children of any person who for any reason is incapable of self-support shall be liable, to the extent of their financial ability, for the support of such person. Upon information of the attorney general or any county or city and county attorney, or upon the sworn complaint of any person in charge of any public or private hos-

pital or institution for the care of indigent persons, or of any other person, or of such indigent person himself, of his own knowledge or upon information or belief, as the case may be, setting forth that such person is indigent and incapable of self-support and has a child or children (giving their names and addresses as far as known) financially able to support such indigent person, filed in the circuit court of any circuit wherein such children or any of them reside, or in which such indigent person is at the time, the judge of said court may cite such children or any of them to appear before him to show cause why they should not pay such sum or sums as may be in the discretion of the judge necessary for the maintenance and support of such indigent person. If after due hearing the judge shall find that such person is indigent and incapable of self-support in whole or in part, as the case may be, the judge may make such order or orders from time to time and upon such terms and conditions as he may prescribe for the maintenance and support of such indigent person as he may deem necessary and reasonable, having due regard to the needs of such indigent person and the financial status of such children or any of them and all of the circumstances of the case, and may enforce such order or orders by summary process.

It shall be the duty of the attorney general, or the county or city and county attorney, to prosecute all proceedings arising under this section.

TORT ACTIONS

Parties: Death by Wrongful Act.

Sec. 2681, R.L. 1925 (as enacted, c. 245, s. 1, Session Laws of Hawaii 1923)

When the death of a person is caused by the wrongful act or neglect of another, any person who was wholly or partly dependent upon such decedent and who has no remedy for compensation under the provisions of chapter 209, may maintain an action for damages against the person causing the death, or if such person so liable was then employed by another person who is responsible for his conduct, then also against such employer. In every action under this section such damages may be given as under all the circumstances may be just. Such action must be commenced within one year after the injury which caused the death.

Sec. 10486, R.L.H. 1945 (under which *Ginoza v. Takai Elec. Co.*, 40 Hawaii 691 (1955) was decided).

Action by dependent, when. When the death of a person is caused by the wrongful act or neglect of another, any person who was wholly or partly dependent upon such decedent may maintain an action for damages against the person causing the death, or if such person so liable was then employed by another person who is responsible for his conduct, then also against such employer. Where there is more than one person wholly or partly dependent upon such decedent, any action that may be brought shall be brought by all of such dependents or by one or more of such dependents for the benefit of all the dependents, but

only one action may be brought and one recovery had. In every action under this section such damages may be given as under all the circumstances may be just and the trial court shall apportion the damages given among all the dependents. In the action the court shall cause notice to be given of the pendency thereof to all known dependents who have not joined therein. Such action must be commenced within two years after the injury which caused the death; provided, however, that nothing in this section shall be construed as authorizing any action to be maintained hereunder against the employer of such decedent in any case where any dependent of the decedent has a remedy for compensation under the provisions of chapter 77.

Sec. 10486, R.L.H. 1945, as amended by Act 205, Session Laws of Hawaii 1955 (effective May 27, 1955).

Death by wrongful act. When the death of a person shall be caused by the wrongful act, neglect or default of any person or corporation, the deceased's legal representative, or any of the persons hereinafter enumerated, may maintain an action against the person or corporation causing the death or against such person or corporation responsible for such death, on behalf of the persons hereinafter enumerated.

In any such action under this section, such damages may be given as under the circumstances shall be deemed fair and just compensation, with reference to the pecuniary injury and loss of love and affection, including (a) loss of society, companion-

ship, comfort, consortium or protection, (b) loss of marital care, attention, advice or counsel, (c) loss of filial care or attention or (d) loss of parental care, training, guidance or education suffered as a result of the death of the person by the surviving spouse, children, father, mother, and by any person wholly or partly dependent upon the deceased person. The jury or court sitting without jury shall allocate the damages to the persons entitled thereto in its verdict or judgment, and any damage recovered under this section, except for reasonable expenses of last illness and burial, shall not constitute a part of the estate of the deceased. If an action be brought pursuant to this section and a separate action brought pursuant to section 10497, such actions may be consolidated for trial on the motion of any interested party, and a separate verdict, report or decision may be rendered as to each right of action. Any action brought under this section shall be commenced within two years from the date of death of such injured person.

No. 15,019

IN THE

United States Court of Appeals
For the Ninth Circuit

JAMES MEREDITH,

Appellant,

VS.

RICHARD MEREDITH SCRUGGS, CAROL
ELIZABETH SCRUGGS, ATLEE GAIL
SCRUGGS, MERI-JO ABRAMS and LOUIS
EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court
for the District of Hawaii.

PETITION FOR REHEARING.

J. GARNER ANTHONY,

312 Castle & Cooke Building, Honolulu, Hawaii,

*Counsel for Appellant
and Petitioner.*

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Of Counsel.

FILED

DEC 18 1956

PAUL B. O'BRIEN, CLERK

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EDMUND ABRAMS,

Appellees.

Upon Appeal from the United States District Court
for the District of Hawaii.

PETITION FOR REHEARING.

*To the Honorable William Denman, Chief Judge and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

We respectfully petition this Court for a rehearing
upon the following grounds:

(1) This Court erred in holding that Hawaiian
judicial precedent established a cause of action in
favor of minor children for injuries sustained by their
mother.

(2) This Court erred in holding that appellant did not question that the injury to the mother "caused a loss" to the children.

(3) This Court erred in misconstruing Section 12264, Revised Laws of Hawaii 1945, as giving children a legal right to the personal attention of their mother.

(4) The Supreme Court of Hawaii, because of the decision of this Court, has accepted for review the same question of law in the case of *Halberg et al. v. Young*, No. 4006. A copy of the question certified to the Supreme Court of Hawaii in said case and now awaiting determination is set forth in the appendix.¹ In the exercise of a sound judicial discretion, this Court should not act on this petition but should stay its hand until the Supreme Court of Hawaii has passed upon the question.

I.

NO HAWAIIAN DECISION ESTABLISHES A CAUSE OF ACTION IN FAVOR OF A MINOR CHILD FOR THE NONFATAL IN- JURIES TO HIS PARENT.

In Hawaii minor children have no claim for damages resulting from the nonfatal injuries sustained by a parent by reason of the negligent conduct of the defendant. This has been the law in this jurisdiction

¹The record in *Halberg v. Young* was docketed in the Supreme Court on November 8, 1956. As counsel for appellant Young, our opening brief was filed November 30, 1956. Appellees' brief is due December 15, 1956. We expect a prompt disposition by our Supreme Court.

from the beginning of our legal history. The decisions of our Supreme Court which have created a new cause of action in favor of a child or parent all involve cases of wrongful death. None affords any basis for the novel extension of tort law to the creation of the cause of action alleged in this complaint.

One of the earliest cases in our reports on wrongful death is *Kake v. Horton*, 2 Hawaii 209 (1860). In that case the court sustained the claim of a widow to recover damages for the wrongful death of her husband. This was an innovation not known to the common law and was predicated upon Section 14 of the Civil Code of 1859 which authorized the court to apply

. . . necessary remedies to evils not specifically contemplated by law.

This provision of the Civil Code of 1859 was repealed by Act 57, Session Laws of 1892, which established the common law in Hawaii, which act is now Section 1, R.L.H. 1945, and provides:

Sec. 1. *Common law applies except when.* The common law of England, as ascertained by English and American decisions, is declared to be the common law of the Territory of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the Territory, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; *PROVIDED*, however, that no person shall be subject to criminal proceedings except as provided by the written laws of the

United States or of the Territory. (R.L.H. 1945, Sec. 1)

This statute has been in force in Hawaii since 1892 without material change.

The common law did not recognize the existence of the claim for relief here asserted. While it is true that this statute does not confine the Hawaiian courts to a fixed set of precedents but allows a degree of flexibility to meet changes in the common law as they develop (*Vierra v. Campbell & Moody*, 40 Hawaii 86 (1853); *Welsh v. Campbell*, 41 Hawaii 106 (1955)), nevertheless where, as here, there is a unanimity of judicial authority opposing the claim asserted and, where no Hawaiian statute or judicial precedent upholds such claim, then the Hawaiian courts do not ignore the command of the statute, but apply the common law.

A case in point is *Hall v. Kennedy*, 27 Hawaii 626 (1923). In that case the dependent parents of an adult child sought damages for loss of support arising out of the death of the child in an accident. The court stated:

An action to recover damages for the death of a relative was not known to the common law. (p. 627)

The court pointed out that in 1892 the Territory, then a kingdom, had enacted what is now Section 1, R.L.H. 1945. The court stated:

The rule of the common law applicable to the question involved herein, not having been altered

by the Constitution or laws of the United States or (until the enactment of Act 245, S.L. 1923) by the laws of this Territory, *must therefore be our guide* in the instant case unless it can be said that a contrary rule of law has been 'fixed by Hawaiian judicial precedent, or established by Hawaiian usage.' (p. 628; emphasis supplied)

Our Supreme Court in the case just cited followed the command of the Hawaiian statute and did not fall into the error against which the learned Cardozo warned:

Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right, to travel beyond the walls of the interstices, the bounds set to judicial innovation by precedent and custom. (Cardozo, *The Nature of the Judicial Process*, p. 129)

In *Hall v. Kennedy*, 27 Hawaii 626, 629, (123), referring to the *Kake* decision, our Supreme Court said:

The cases of *Kake v. Horton* and *Ferreira v. Hon. R.T. & L. Co.* above cited are undoubtedly authority for the proposition that, as 'fixed by Hawaiian judicial precedent' the common law rule denying a right of action to a widow for the wrongful death of her husband or a right of action to a father for the wrongful death of his minor son, has been abrogated in this jurisdiction. But, in conceding that the cases cited go to such lengths, it does not follow that, in the case of the death of an adult, a person dependent upon the de-

ceased, even if such dependent be the father or mother of deceased, has, in the absence of statute, a right of action against the person causing the death of deceased. In *Kake v. Horton* the court, owing to the statute then in vogue, doubtless was authorized in allowing the widow to maintain her action for, in addition to the power vested in the court by that broad statute, a husband is bound by law to support his wife, and the legal right of the wife for such support was infringed by the wrongful act of the defendant. The same may be said of the *Ferreira* case for, since by law a father is entitled to the earnings of his son during the son's minority, a right of action may be maintained by the father against one who, by causing the son's death, deprives the father of that legal right. Where, however, no legal right is infringed, no right of action may be maintained.

Again in *Wada v. Associated Oil Co.*, 27 Hawaii 671, 673 (1924), which was an action brought for consequential damages suffered by a father by reason of the death of his son caused by the alleged negligent act of plaintiff, our court said:

The instruction as given substantially follows the rule enunciated by this court in the case of *Ferreira v. H.R.T. & L. Co.*, 16 Hawaii 615, 628, where this court, consonant with its *renunciation of the common law rule that no action lay for the taking of human life* (see *Kake v. Horton*, 2 Hawaii 209), held that *an action could be maintained in this Territory by a father for the death of a minor child and . . .* (Emphasis supplied).

It is obvious from the decision in *Hall v. Kennedy*, *supra*, and from the subsequent death cases in Hawaii such as *Gabriel v. Margah*, 37 Hawaii 571 (1947), and *Young v. H.C. & D. Co.*, 34 Hawaii 426 (1938), that departure in our judicial decisions from the common law in *Kake v. Horton*, 2 Hawaii 209 (1860), was confined to cases involving wrongful death where the party suing could claim damage directly resulting from the deprivation of some legal relationship. After the adoption of the common law, the Hawaiian courts refused to broaden the *Kake* rule to include other classes of cases.

Moreover, it is apparent from the language in the opinion in the *Kake* case itself that, had it not been a case where the death of the husband had resulted from the injury, an action would not have been allowed, for the court said:

We are of the opinion that much of the law read by the learned counsel for defendant, as well as a great part of their argument, is inapplicable to the question at issue.

They treat the case as if this was an action of trespass brought by the plaintiff to recover damages for an assault and battery, committed on her deceased husband, Charlie Pihaole; whereas, as we understand the matter, it is an entirely different thing, being an action on the case, to recover for consequential damage resulting to the plaintiff by reason of the death of her late husband, which she alleges to have been caused by the wrongful act of the defendant, Horton. (p. 210; emphasis supplied)

The Hawaiian legislature has broadened the remedies allowed in wrongful death cases. Thus, as pointed out in *Hall v. Kennedy*, 27 Hawaii 626 (1923), a statute had been enacted, by the time that case was decided, which allowed actual dependents to recover in death cases. This statute is now Section 10486, R.L.H. 1945. Act 205, S.L. 1955, effective May 27, 1955, extended the damage recoverable in a statutory death action to include pecuniary injury by reason of losses in the nature of those sought in the present case. No attempt, however, was made in the statute to allow recovery of damages for such losses in cases where death did not result from the injury.

A review of the Hawaiian cases, *Kake v. Horton*, 2 Hawaii 209 (1860); *Ferreira v. Hon. R.T. & L. Co.*, 16 Hawaii 615 (1905); *Hall v. Kennedy*, 27 Hawaii 626 (1923); *Globe Indemnity Co. v. Araki*, 32 Hawaii 153 (1931); *Young v. H.C. & D. Co.*, 34 Hawaii 426 (1938); *Gabriel v. Margah*, 37 Hawaii 571 (1947); *Ginoza v. Takai Elec. Co.*, 40 Hawaii 691 (1955); and *Enos v. Hono. Motor Coach Co.*, 34 Hawaii 5 (1936), shows no disposition on the part of our courts to extend the principle adopted in the *Kake* case beyond the limitations previously set forth. On the contrary, the decision in *Hall v. Kennedy*, *supra*, expressly holds that in obedience to Section 1, R.L.H. 1945, that principle would not be so extended.

The most recent decision of our Supreme Court on the question of creating novel causes of action in tort is the case of *Kamanu v. Black*, 41 Hawaii 442, decided May 4, 1956. In that case our Court

refused to create a cause of action in favor of representatives of a deceased employee covered by the Workmen's Compensation Act. Although pressed to follow the bizarre rule laid down by the Court of Appeals for the District of Columbia, in *Hitafter v. Argonne, Inc.*, 183 F. 2d 811, the Supreme Court of Hawaii refused to do so.²

A review of the Hawaiian statutes, Act 245, S.L. 1923 (now Section 10486, R.L.H. 1945), Act 206, S.L. 1953 (providing for the survival of tort actions), Act 205, S.L. 1955 (allowing recovery of damages in a statutory death action to the same extent as to recovery allowed under *Kake v. Horton, supra*), affords no basis for sustaining the claim here asserted. On the contrary, they all deal with claims arising out of the death of the person injured.

Thus, just as in *Hall v. Kennedy*, 27 Hawaii 626, we have a situation where the common law does not recognize a right to relief and where neither Hawaiian judicial precedent nor statutes can be construed to uphold such a right. It is therefore clear that the substantive law of Hawaii will deny the claim for relief.

²The District Court for Hawaii in the instant case relied upon the discredited *Hitafter v. Argonne*, saying "It is significant that *Hitafter* which recognized a cause of action in the wife, was decided later than *Elder and McMillan* on which Judge Youngdahl relied as indicating a trend in the District of Columbia." (R. 16). A unique departure from the universal rule by the Court of Appeals for the District of Columbia is hardly evidence of the law of Hawaii; particularly so when that decision has for all practical purposes been put at rest by a per curiam in the same court. *Brown v. Curtin & Johnson, Inc.*, 221 F. 2d 106 (CA DC 1955).

Our reported decisions now encompass forty-one volumes beginning with the year 1847 which antedates by several years the first reported decision of the Supreme Court of California. Surely, if such a cause of action as that alleged here (which was unknown at the common law) actually existed in Hawaii, some allusion to it would be found in our reports. No such reference exists, nor does anything in our history or legislation afford any base for the conclusion that this cause of action is sanctioned by Hawaiian usage. This Court erred when it held that such a liability "has been determined by Hawaiian judicial precedent and usage."

II.

THIS COURT MISCONSTRUED OUR LOCAL STATUTE ON PARENTAL CONTROL.

Section 12264, R.L.H. 1945, provides:

Parents' control and duties; binding out of children by judge.

Parents, or, in case they be both dead, guardians, legally appointed, shall have control over the actions, the conduct and the education of their children during their minority; they shall have the right, at all times, to recover possession of their children by habeas corpus, and chastise them moderately for their good; and it shall be the duty of all parents and guardians to set a good example before their children; to provide, to the best of their ability, for their support and education; to see that they are instructed in a knowledge of religion; to use their best endeavors

to keep them from idleness and vice of all kinds; and to inculcate upon them habits of industry, economy and loyalty; and it shall be lawful for any judge of any circuit court, on a complaint being laid before him against any parent, that he or she is encouraging their children in ignorance and vice, to summon such parent before him; and, upon its being proved to his satisfaction, to bind out such children during their minority to some person of good moral character, to be well supported, trained to good habits, and taught at least the rudiments of knowledge.

This statute plainly delineates powers, rights and duties of parents. Parents have *a power* over control of the conduct, actions and education of minor children. They have *a right* to the possession of the children and to chastise the children. They have *a duty* to set a good example for the children and *to provide, to the best of their ability*, for the support and education, *and to see* that they are instructed in a knowledge of religion, *to use their best endeavors* to keep them from idleness and vice of all kinds, and to inculcate upon them the habits of industry, economy and loyalty.

In its opinion this Court said:

The question then is, is there established by 'Hawaiian judicial precedent' and 'usage' the children's right to recover damages from a tortfeasor who, by injuring their mother, deprives them of their legal right to the education she gives them, beginning with the 'education' of suckling children in cleanly habits and the names

of the objects with which they first come in contact and on through their minority and the 'control over their actions' during that time, 'to keep them from idleness and vice' and 'to inculcate upon them habits of industry, economy and loyalty'—rights created by Section 12264, Rev. Laws Haw. 1945. (Opinion, p. 2)

This statute does not give to children any legal right to the education by their parents personally. Parents under this statute are required only to provide their education. As to the duty of the parents to see that they are instructed in a knowledge of religion, that again is not a requirement that the parent personally give them such instruction. As to keeping the children from idleness and vice, the parent is required only to use his endeavors to that end. The same is true of the duty to inculcate habits of industry, economy and loyalty. Nothing in the statute requires that any of the duties of the parent be done by a parent personally.

Moreover, there is no allegation in the complaint that there was a failure as a result of the injury of the mother on her part to carry out any duty to instruct the children in the knowledge of religion or to keep them from idleness and vice or to inculcate upon them habits of industry, economy and loyalty.

It should be noted that the person injured was the children's mother. Nowhere in the complaint is it alleged that the father was unable to carry the duties of a parent under Section 12264, R.L.H. 1945. The

duties set out in that section, of course, devolve in the first instance upon the father and only upon the mother in the absence of the father. Thus the Supreme Court of Hawaii, in construing this statute, has stated:

Under the provisions of section 2998, R.L. 1915, parents, first the father and then the mother, are required to provide to the best of their ability for the support and education of their children. *Wada v. Associated Oil Co.*, 27 Hawaii 671, 675.

Moreover, there is nothing in Section 12264, R.L.H. 1945, which gives a child *a legal right to the personal education, care, comfort and society of its mother*, and in construing our statute to give such a legal right, this Court committed error. No action for damages can be brought by a child against his parent for breach of the statutory duty. In fact the District Court in this very case recognized that a minor child could not bring an action against his father when it denied appellant's motion to bring in a third party defendant (R. 27). 2 Cooley, *Torts*, 4th Ed. Sec. 174. This error, moreover, was crucial to the case.

As our decisions show, the loss compensated for in the death cases cited by this Court was a pecuniary loss. *Gabriel v. Margah*, 37 Hawaii 571, 582 (1947). The mother has recovered the full pecuniary damage of her loss as a result of the accident. The statute makes the providing of education and support a duty of the parent and if, as here, the parent has recovered his or her pecuniary loss, she is in a position to carry out that duty. The children, therefore, have suffered

no pecuniary loss arising from the injury to the mother.

III.

THIS COURT ERRED IN HOLDING THAT THE FACT OF LOSS BY THE CHILDREN WAS NOT DISPUTED BY APPELLANT.

In its opinion this Court stated:

The tortious injury to the mother and that it caused a loss to the children of the amounts recovered are not questioned. (Opinion, p. 1)

This is an erroneous statement of appellants' position. Appellant of course disputes the fact that any pecuniary loss has been sustained by the children, for the plain reason that no legal right of the children has been invaded. Section 12264, R.L.H. 1945, gives to appellees no legal right to personal education or the care, comfort or society of a parent. Moreover, until it is alleged and shown that appellees' father has not met the provisions of Section 12264, no duty devolved upon the mother to carry out the provisions thereof, and hence there can be no corresponding right on the part of the child. Even if the father and mother were in default, the remedy of the child would be to enforce compliance by contempt process, not an action at law for damages.

IV.

THIS COURT SHOULD STAY ITS HAND PENDING THE DETERMINATION OF THIS QUESTION BY THE SUPREME COURT OF HAWAII.

As the papers which are attached to this petition establish, the Supreme Court of Hawaii, after the opinion of this Court in this case, accepted on reservation the question of a minor child's right to recover for partial deprivation of the care, comfort and society of its mother (see Appendix, *Halberg v. Young*). Our Supreme Court had previously rejected this same reserved question but because of this Court's opinion in the instant case has now entertained it in order to settle the law of Hawaii on the subject.

The decisions of the Supreme Court of Hawaii on local questions are controlling on the federal courts, *Waialua v. Christian*, 305 U.S. 91 (1938), and the decisions of the highest court of Hawaii "are the natural sources for the interpretation and application" of Hawaiian statutes, *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 383 (1949). It would seem that this Court, in the interests of the preservation of judicial harmony between the federal and territorial court systems in the Territory of Hawaii, should either grant a rehearing or stay its hand on this petition until the Supreme Court of Hawaii has passed on this important question of local law now pending before it. No possible prejudice to appellees can occur. If we are wrong on the law of Hawaii, the Supreme Court will say so and appellees will recover their judgment with interest.

CONCLUSION.

We disapprove of petitions for rehearing. Usually they are nothing more than the post mortems of disappointed counsel. This is not the case here. This Court, by judicial legislation, has created a new cause of action in Hawaii. If this is to be done by a court, not the legislature, the Supreme Court of Hawaii should do it.

We respectfully submit that the petition for rehearing should be granted, and that upon a rehearing the case should be reversed and remanded to the District Court with instructions to vacate the judgment and to dismiss the complaint as to appellees.

Dated, Honolulu, Hawaii,
December 17, 1956.

Respectfully submitted.

J. GARNER ANTHONY,
*Counsel for Appellant
and Petitioner.*

ROBERTSON, CASTLE & ANTHONY,
Of Counsel.

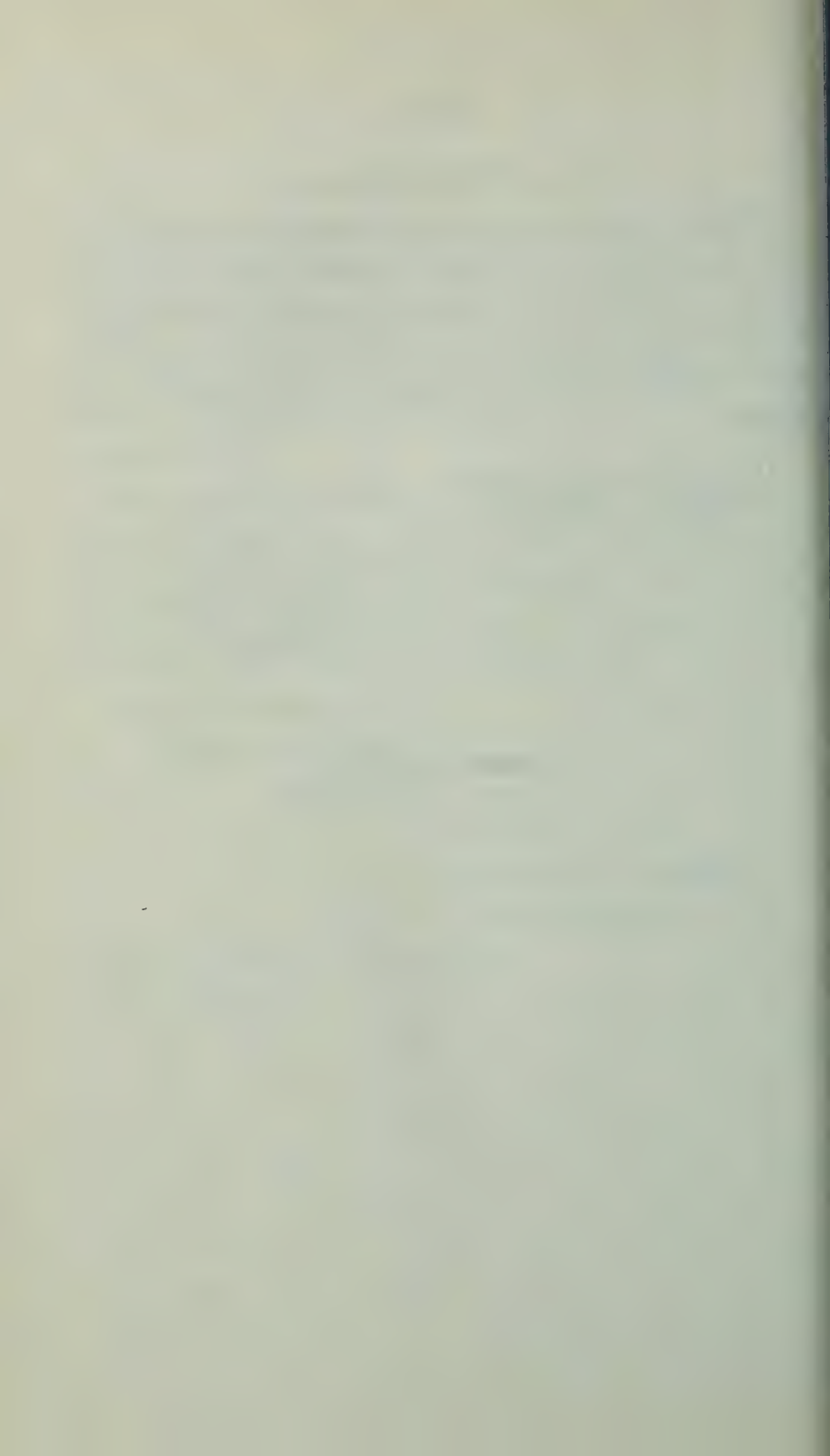
CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for rehearing is well founded in point of law as well as in fact and that said petition for rehearing is not interposed for delay.

Dated, Honolulu, Hawaii,
December 17, 1956.

J. GARNER ANTHONY,
*Of Counsel for Appellant
and Petitioner.*

(Appendix Follows.)



Appendix.



Appendix

No. 4006

*In the Supreme Court of the
Territory of Hawaii*

Emma Marion Halberg and Herbert P.
Halberg, individually and jointly, and
as natural guardians of Marilyn Sue
Halberg, Gerald Leslie Halberg, and
David Elliott Halberg, minors,

Plaintiffs,

vs.

Sai K. Young,

Defendant.

QUESTION OF LAW RESERVED TO THE SUPREME COURT.

This cause having come on for hearing upon defendant's motion to dismiss, and this Court having a well-founded doubt upon the following question of law raised by the pleadings and record herein and deeming the reservation of the same and answer by the Supreme Court will best serve the interests of justice in this and prospective and pending litigation in numerous other cases, hereby of its own motion reserves the following question to the Supreme Court for its decision and answer, the defendant maintaining the affirmative thereof:

Should the motion to dismiss be granted on the ground that a complaint of minor children for damages arising out of the disability of their mother, caused by alleged negligence of the defendant, with attendant loss of acts of kindness, care, attention and other incidents of the parent and child relationship, fails to state a claim upon which relief can be granted?

Attached hereto and made a part hereof is the original record in the above entitled cause, including the following:

- (1) Complaint and Summons;
- (2) Motion to Dismiss.

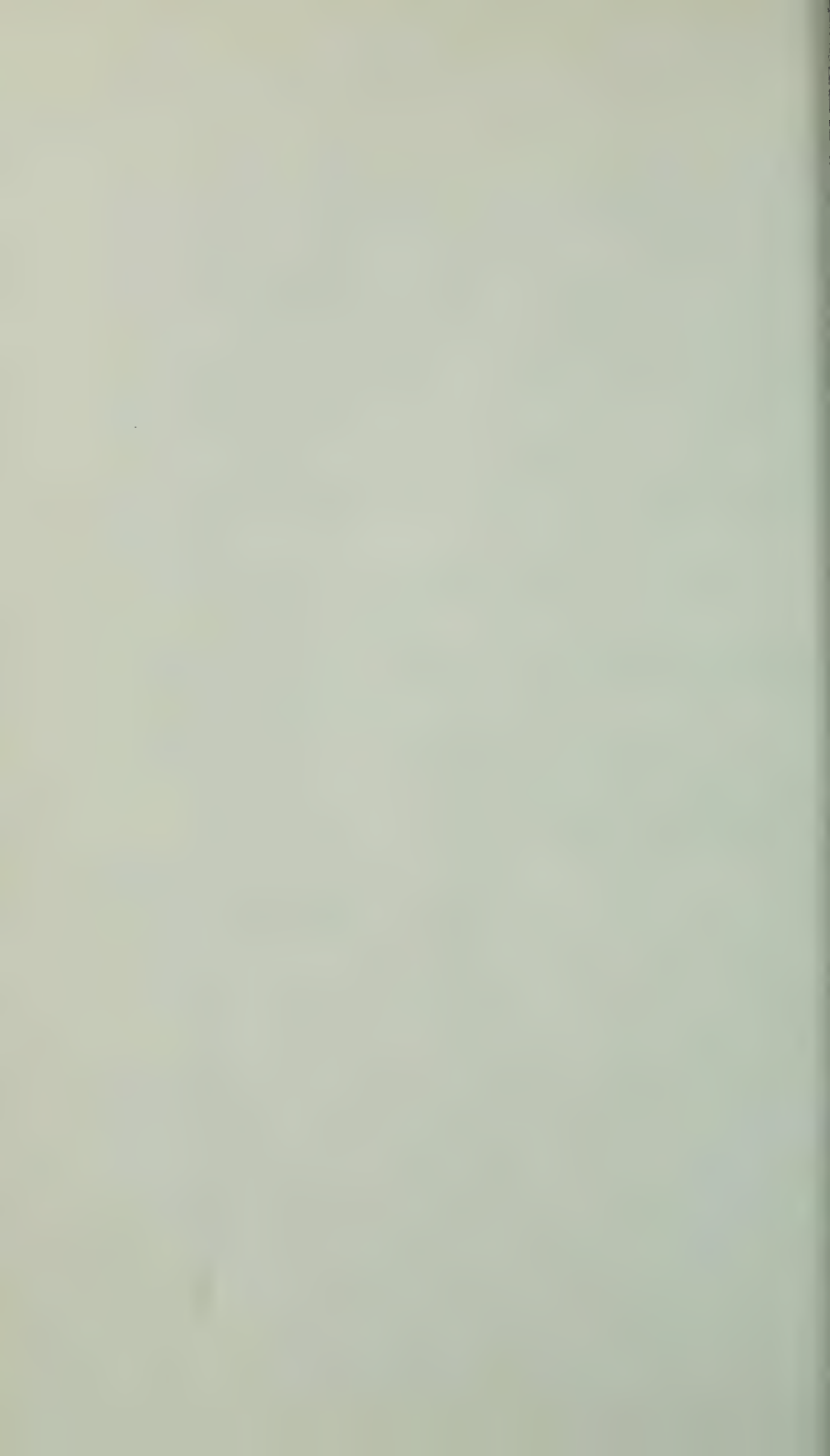
Witness my hand and seal of this Court this 8th day of November 1956.

(Seal)

Calvin C. McGregor,
Presiding Judge, First Circuit,
Territory of Hawaii.

Attest:

W. C. Ing, Clerk.



No. 15021

United States
Court of Appeals
for the Ninth Circuit

EUGENE RAYSON, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

APR - 2 1956

PAUL P. O'BRIEN, CLERK

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District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

Attorney for Appellant:

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649 South Olive Street,
Los Angeles 14, California.

Attorney for Appellee:

LAUGHLIN E. WATERS,
United States Attorney,
600 Federal Building,
Los Angeles 12, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the United States District Court for the Southern District of California, Central Division

September, 1955, Grand Jury

No. 24568-Cr.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

OLLIE W. KELLEY and EUGENE RAYSON,
Defendants.

INDICTMENT

[U.S.C., Title 18, Sec. 371; U.S.C., Title 21, Sec. 174—Conspiracy, illegal concealment, sale of narcotics]

The grand jury charges:

Count One

[U.S.C., Title 18, Sec. 371]

Commencing prior to the date of the commission of the first overt act hereinafter set forth and continuing to and including October 6, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Ollie W. Kelley and Eugene Rayson and divers other persons to the grand jury unknown did agree, confederate, and conspire together to commit offenses against the United States as follows: to knowingly receive, conceal, sell, transport, and to facilitate the transportation, concealment, and sale of, certain narcotic drugs after importation in vio-

lation of United States Code, Title 21, Section 174; the objects of said conspiracy were to be accomplished as follows: defendant Ollie W. Kelley was to purchase narcotic drugs, to conceal them, and to deliver them to defendant Eugene Rayson [2] and he was to direct persons interested in buying such drugs to defendant Eugene Rayson who would conceal the drugs and sell them to such persons; and at all times herein mentioned said narcotic drugs, as the defendants then and there well knew, had been imported into the United States contrary to law; and

To effect the objects of said conspiracy the defendants committed the following overt acts in Los Angeles County, California:

(1) On or about August 22, 1955, defendant Ollie W. Kelley had a conversation with Norman Fletcher;

(2) On or about September 13, 1955, defendant Ollie W. Kelley had a conversation with Norman Fletcher;

(3) On or about September 14, 1955, defendant Eugene Rayson had a telephone conversation with Norman Fletcher;

(4) On or about September 14, 1955, defendant Eugene Rayson received \$700.00 from Norman Fletcher;

(5) On or about September 14, 1955, defendant Eugene Rayson delivered 2 ounces, 82 grains of heroin to a location in Los Angeles County, California; and

(6) On or about September 22, 1955, defendant Ollie W. Kelley had a conversation with Norman Fletcher. [3]

Count Two

[U.S.C., Title 21, Sec. 174]

On or about September 13, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Ollie W. Kelley and Eugene Rayson did, after importation, knowingly and unlawfully receive, conceal, and transport, and facilitate the concealment and transportation of, a certain narcotic drug, namely: approximately 2 ounces, 82 grains of heroin, and knowingly assist in so doing, which said heroin, as the defendants then and there well knew, had been imported into the United States of America contrary to law, in violation of United States Code, Title 21, Section 174. [4]

Count Three

[U.S.C., Title 21, Sec. 174]

On or about September 13, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Ollie W. Kelley and Eugene Rayson, after importation, did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely: approximately 2 ounces, 82 grains of heroin, to Norman Fletcher, which said heroin, as the defend-

ants then and there well knew, had been imported into the United States contrary to law.

A True Bill.

/s/ ORVILLE J. HARRELL,
Foreman

/s/ LAUGHLIN E. WATERS,
United States Attorney [5]

[Endorsed]: Filed November 16, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Arraignment and Plea

Date: November 21, 1955, at Los Angeles, Calif.

Present: The Hon. Harry C. Westover, District Judge; Deputy Clerk: Mary O. Smith; Reporter: S. J. Trainor; U. S. Att'y, by Ass't U. S. Att'y: Volney V. Brown, Jr.; Counsel for Defendants: Wm. H. Neblett and Harry W. Dudley.

Defendants present (on O/R).

Proceedings: For arraignment and plea of each defendant on all three counts of indictment. Each Defendant is arraigned and pleads not guilty as charged in each of counts 1, 2 and 3 of the Indictment.

It Is Ordered that this cause is referred to the Probation Officer for pre-sentence investigation and report, and the cause is continued for sentence on counts.

It Is Ordered that this cause is set for trial Nov.
29, 1955, 10 a.m.

JOHN A. CHILDRESS,
Clerk

[6]

[Title of District Court and Cause.]

WAIVER OF JURY

The above cause coming on regularly for trial, defendants being present with counsel, Wm. H. Neblett and Harry W. Dudley, Esq., and the defendants being desirous of having the case tried before the Court without jury, now requests of the Court that the case be so tried and hereby consents that the Court shall sit without a jury and hear and determine the charges against the defendants without a jury.

Dated: November 29, 1955.

/s/ OLLIE W. KELLEY,

/s/ EUGENE RAYSON,

Defendants in pro per.

I have advised the defendant fully as to his rights and assure the Court that his request for a trial without a jury is understandingly made.

/s/ WM. H. NEBLETT,

/s/ HARRY W. DUDLEY,

Attorneys for Defendants

The United States Attorney consents that the request of the defendant be granted and that the trial proceed without a jury.

/s/ ROBERT J. JENSEN,
Assistant U. S. Attorney

Approved:

/s/ HARRY C. WESTOVER,
U. S. District Judge [7]

[Endorsed]: Filed November 29, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 1, 1955, at Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge; Deputy Clerk: Mary O. Smith; Reporter: S. J. Trainor. U. S. Att'y, by Ass't U. S. Att'y Robert J. Jensen; Counsel for Defendants: Wm. H. Neblett and Harry W. Dudley.

Defendants present (on O/R).

Proceedings: For further trial.

Counsel for Gov't argues to the Court.

Attorney Neblett argues and Attorney Dudley argues.

Court makes a statement and Finds Def't Kelley not guilty on each of counts 1, 2, and 3, and Finds Def't Rayson not guilty on count 1, and guilty on counts 2 and 3 of Indictment.

Court Orders cause referred to Probation Officer

for investigation and report as to Deft Rayson and continued to Dec. 19, 1955, 2 p.m., for sentence of Deft Rayson on counts 2 and 3, and that Deft Rayson remain on bond posted in Case No. 24,517-Cr., and that bond of Deft Kelley in Case No. 24,517-Cr. is exonerated.

JOHN A. CHILDRESS,

Clerk

[8]

[Title of District Court and Cause.]

NOTICE OF HEARING OF MOTION FOR
NEW TRIAL

To Plaintiff Herein, and to the United States Attorney:

You, and Each of You, Are Hereby Notified that on Monday, December 19, 1955, at the hour of 2 p.m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Harry C. Westover, Judge of the above entitled court, defendant Eugene Rayson will make a motion for a new trial, which said motion is hereunto attached.

Dated: December 6, 1955.

WM. H. NEBLETT,

HARRY W. DUDLEY,

/s/ By HARRY W. DUDLEY,

Attorneys for Defendant,

Eugene Rayson

The Court fixes the 19th day of December at 2 p.m. for said motion and the time is extended accordingly.

12/6/55

/s/ H. C. W., Judge

[9]

MOTION FOR NEW TRIAL

Defendant, Eugene Rayson, moves the Court to grant him a new trial for the following reasons:

1. The Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's evidence.

2. The decision is contrary to the weight of the evidence.

3. The decision is not supported by substantial evidence.

4. The Court erred in admitting testimony of the witness, Norman Fletcher, to which objections were made.

5. The Court erred in admitting testimony of the witness, M. P. Richards, to which objections were made.

6. The Court erred in admitting testimony of the witness William R. Farrington, to which objections were made.

7. The Court erred in admitting testimony of the witness, A. F. Landry, to which objections were made. [10]

8. The Court erred in ruling that the evidence did not disclose an entrapment of defendant.

9. The Court erred in ruling that the telephone conversations between the witness, Norman Fletcher, and defendant, a recording instrument at such times being attached to the telephone and recordings made of said conversations, were admissible.

10. The Court erred in denying defendant's motion to strike the testimony of telephone conversations between the witness, Norman Fletcher, and defendant, a recording instrument at such times being attached to the telephone and recordings made of such conversations.

Dated: December 6, 1955.

WM. H. NEBLETT,
HARRY W. DUDLEY,

/s/ By HARRY W. DUDLEY,

Attorneys for Defendant,
Eugene Rayson [11]

Acknowledgment of Service attached. [13]

[Endorsed]: Filed December 6, 1955.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 19, 1955, at Los Angeles, Calif.

Present: Hon. Harry C. Westover, District Judge; Deputy Clerk: Mary O. Smith; Reporter: S. J. Trainor; U. S. Att'y, by Ass't U. S. Att'y

Robert J. Jensen; Counsel for Defendant: Wm. H. Neblett and Harry W. Dudley.

Defendant present (on O/R).

Proceedings: For hearing motion of Def't Rayson, filed Dec. 6, 1955, for new trial, and for sentence of Def't Rayson on counts 2 and 3 (finding of guilty).

Attorney Dudley argues in support of said motion for new trial.

Court orders said motion for new trial denied.

Attorney Neblett makes a statement on behalf of defendant.

Attorney Jensen makes a statement.

Court Sentences defendant to three years imprisonment on each of counts 2 and 3 of Indictment, to begin and run concurrently, and to pay a fine unto USA in sum of \$5. on each of said two counts, (2, and 3,) making a total fine of \$10.

On motion of Attorney Neblett for defendant, Court sets bond on appeal at \$5,000.

JOHN A. CHILDRESS,

Clerk

[20]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Name and address of Appellant: Eugene Rayson, 624 East 97th Street, Los Angeles, California.

Names and address of Appellant's Attorneys: Wm. H. Neblett and Harry W. Dudley, Suite 927,

649 South Olive Street, Los Angeles 14, California.

Offense: The appellant was convicted on two counts of an indictment, one for the receipt, concealment and transportation of heroin, and the other for the sale of heroin, in violation of United States Code, Title 21, Section 174.

On December 19, 1955, the appellant, Eugene Rayson, was sentenced to the Federal penitentiary for three years and fined \$5.00 on each of the two counts above-stated. The sentences are to run concurrently. [21]

The appellant, Eugene Rayson, is at liberty on \$5,000.00 bail pending his appeal.

I, the above-named appellant, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the above-stated judgment.

Dated: December 23, 1955.

/s/ EUGENE RAYSON,
Appellant

WM. H. NEBLETT and
HARRY W. DUDLEY,

/s/ By WM. H. NEBLETT,
Attorneys for Appellant [22]

Affidavit of Service by Mail attached. [23]

[Endorsed]: Filed December 23, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 29, inclusive, contain the original

Indictment;

Waiver of Jury;

Notice of Hearing of Motion for New Trial;

Opposition to Granting Motion for New Trial;

Notice of Appeal;

Appellant's Designation of Record;

Appellee's Counter-Designation of Record; and a full, true and correct copy of the Minutes of the Court on November 21, 1955; December 1, 1955; December 19, 1955, which, together with the original reporter's transcript of Proceedings had on November 29, 30, and December 1, 1955, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in said cause.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 1st day of February, 1956.

[Seal]

JOHN A. CHILDRESS,

Clerk

/s/ By CHARLES E. JONES,

Deputy

In the United States District Court for the Southern District of California, Central Division

No. 24517-24568—Criminal

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EUGENE RAYSON and OLLIE W. KELLEY,
Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, Calif., Tuesday, Nov. 29, 1955

Honorable Harry C. Westover, Judge presiding.

Appearances: For the Plaintiff: Laughlin E. Waters, United States Attorney, Los Angeles 12, Calif., by Robert John Jensen, Assistant U. S. Attorney. For the Defendants: William H. Neblett, Esq., 649 S. Olive St., Los Angeles, Calif.; and Harry W. Dudley, Esq. [1*]

(Other court matters.)

The Clerk: No. 3 on the calendar. 24517, United States vs. Eugene Rayson and Ollie W. Kelley for trial, and 24568, same defendants, for trial.

Mr. Jensen: The Government is ready.

Mr. Neblett: We were informed by Mr. Jensen yesterday who asked us if it was agreeable for us that the case be transferred to another department. I don't know what the situation is there.

The Court: I don't know either, Mr. Neblett, until I call the calendar and find out what I have

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

got left. I may not have anything left before I get through. I want to see how many cases we have ready for trial.

Mr. Neblett: We are ready for trial now.

The Court: You are ready for trial now?

Mr. Neblett: Yes, your Honor.

The Court: Before a jury?

Mr. Neblett: We waive a jury. We talked with the District Attorney about that and we agreed to waive a jury if it meets with the consent of this court, and we have signed it here. We will have the defendants sign it too, if necessary.

The Court: If you want to waive the jury I feel it is a compliment to the court. [4]

Mr. Neblett: If your Honor please, the defendants are here and we will ask them what their feelings are about it.

This is Ollie Kelley. Do you desire to waive a jury?

The Defendant Kelley: Yes, sir.

Mr. Neblett: This is Eugene Rayson. Do you desire to waive a jury?

The Defendant Rayson: Yes, sir.

The Court: It may be filed. Have you filled out the form?

Mr. Neblett: It hasn't been signed by the District Attorney yet, your Honor.

The Court: Now inasmuch as the jury has been waived, how long will it take to try the case?

Mr. Neblett: We don't exactly know. The District Attorney stated it will take about two days. I

think after we have waived the jury it will take about a day less.

Mr. Jensen: I think it will still run over until the second day.

Mr. Neblett: I think it requires about half a day to put on our case after the prosecution is through.

The Court: We will call the other case, Mr. Neblett.

(Other court matters.)

Mr. Jensen: Your Honor please, the Government in the case of Ollie W. Kelley and Eugene Rayson anticipated that that case would be transferred to Judge Yankwich. We have [5] our witnesses in the building but they are not all presently in the courtroom.

I wonder if your Honor would grant us a very short recess to assemble the witnesses.

The Court: All right. We can take a few minutes recess.

Mr. Neblett: We came up too without our information on the trial.

The Court: Why didn't you say so somewhere along the line?

Mr. Neblett: If your Honor please, it is all right with us. We said we are ready to go to trial and we will be. We may have to go back to the office for a short while.

The Court: You told me you were ready to go to trial immediately.

Mr. Neblett: I was. We were ready to go to

trial, but Mr. Jensen told us yesterday that he thought the case would go over to Thursday.

Mr. Jensen: I think your Honor originally anticipated this case going over.

The Court: This is the only case in which the jury was to be waived and I thought Judge Yankwich had better take a non-jury case and he agreed to take it, provided he could try it in one day. Well, now, I have only got the 1-day case. I dislike to send him a case that is going to take two [6] days. He said he is going to take it for one day. Of course we have got two days to try this case.

Mr. Neblett: We are ready. As soon as Mr. Jensen rounds up his witnesses we will be ready to go ahead. He has the laboring oar, so we can sit back.

The Court: How long will it take you to gather up your witnesses?

Mr. Jensen: I would like 15 minutes, your Honor.

The Court: We will take a recess until 10:35. That will give you about 17 minutes.

(Short recess.)

The Court: Call your first witness.

Mr. Jensen: The United States will call Albert Fletcher.

ALBERT FLETCHER

called as a witness by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Albert Fletcher.

(Testimony of Albert Fletcher.)

Mr. Neblett: If your Honor please, may I interrupt Mr. Jensen at this moment to say that the previous indictment, that it was brought to this court's attention the last time we were here, that the previous indictment against these two defendants, 24517, would, with the consent of the court, [7] be allowed to go along with this trial until the trial was completed and then on agreement, if the court approves it, with the District Attorney that the first indictment will be dismissed.

Is that correct?

Mr. Jensen: That is correct.

Mr. Neblett: That is my understanding, it will be dismissed.

Mr. Jensen: Has the witness stated his name for the record?

The Witness: Yes.

The Clerk: Yes.

Direct Examination

Q. (By Mr. Jensen): You reside in Los Angeles, California, do you not? A. I do.

Q. I will ask you whether or not you are acquainted with the defendant Ollie W. Kelley.

A. I am.

Q. Is he present in the courtroom this morning?

A. He is.

Q. Is he the gentleman to my right here in the gray suit? A. Yes, he is.

(Testimony of Albert Fletcher.)

Q. Are you also acquainted with the defendant Eugene [8] Rayson? A. I am.

Q. And is he also present in court?

A. He is.

Q. And he is the gentleman to my right in the tan jacket, is he not? A. That is right.

Mr. Jensen: May the record show that the witness has indicated the defendants Kelley and Rayson?

The Court: It may so show.

Q. (By Mr. Jensen): Mr. Fletcher, calling your attention to the month of August, 1955, and particularly to the 22nd thereof, I ask you whether or not you had occasion on that day to see the defendant Kelley. A. I did.

Q. Would you state where it was that you saw him? A. The La Jolla Cleaners.

Q. Is that located in Los Angeles?

A. It is.

Q. On what street?

A. On Sixth Street at Stanford.

Q. Could you tell us the approximate time of day? A. About 10:30.

Q. A.m. or p.m.? [9] A. P.m.

Q. Was there anybody else present at the time that you saw him? A. No.

Q. Did you have a conversation with him?

A. I did.

Q. Would you state the substance of the conversation as you recall it?

(Testimony of Albert Fletcher.)

A. As I walked into the La Jolla Cleaners, me and the defendant, Mr. Ollie Kelley, exchanged greetings——

Mr. Neblett: Excuse me one moment. I don't hear the witness very well. May I sit over here?

The Court: You can sit over there.

Q. (By Mr. Jensen): You said, I think, that you had gone into the La Jolla Cleaners and exchanged greetings with Mr. Kelley. Would you pick it up from there, please?

A. We exchanged greetings, and he told me that he had not seen me in quite a while.

I told him I hadn't been around, and I told him I was interested in buying some stuff.

He asked me, had I saw Rayson, and I told him no, I hadn't, and he went on to state that it wasn't anything in commission during that week, but there was a fellow in Los Angeles at the time, about a week ago, that had about 50 ounces [10] and I could have got a pretty good deal from him for approximately \$10,000 for the 50 ounces, which was about \$200 an ounce. And he got on the telephone and he made a phone call, which wasn't completed.

Q. Prior to his making that telephone call, did he inform you who he was attempting to call?

A. F. A.

Q. Who is this F. A.? A. Eugene Rayson.

Q. Is that a nickname of Mr. Rayson?

A. It is.

Q. Is he generally known by it? A. He is.

(Testimony of Albert Fletcher.)

Q. Go on.

A. And before I left the establishment he made a second call, and he also stated that he couldn't get in touch with him, and he asked me——

Mr. Neblett: If your Honor please, we object to that. I don't know who he is stating this to now.

Q. (By Mr. Jensen): This conversation that you are speaking about is still between yourself and Mr. Kelley? A. Mr. Kelley.

Mr. Neblett: But he is making a telephone call.

Mr. Jensen: I think you misunderstood. He hasn't said [11] that the call was completed.

Mr. Neblett: Excuse me.

Q. (By Mr. Jensen): Were these telephone calls placed in your presence? A. They were.

Q. Were any of the calls completed?

A. They wasn't.

The Court: What do you mean by "completed"? He didn't get the fellow on the other end?

The Witness: He didn't get the fellow on the other end.

The Court: Neither one of these calls?

The Witness: Neither one of those two calls.

Q. (By Mr. Jensen): Did your conversation with Mr. Kelley continue after the telephone calls?

A. Yes.

Q. What else was said?

A. He asked me, did F. A. know how to get in touch with me, and I told him yes, he did know how to contact me.

(Testimony of Albert Fletcher.)

Q. Was anything else said that you recall?

A. No. He told me that he would have him to call me. I left the establishment.

Q. That is, the defendant Kelley said he would have Rayson call you?

A. He would have Rayson to call me. [12]

Q. About how long did the conversation last between yourself and Mr. Kelley?

A. Between 10 and 15 minutes.

Q. Did you leave thereafter? A. I did.

Q. Now prior to your going down there on that particular occasion, had you been in contact with any police officers or agents of either the County of Los Angeles or the United States Government?

A. I was.

Q. Did those people consist of Mr. Richards of the Bureau of Narcotics and Sergeant Landry of the Sheriff's office and Deputy Farrington of the Sheriff's office? A. It did.

Q. Had they accompanied you down to the La Jolla Cleaners or in the vicinity?

A. They had.

Q. They didn't go in with you, however?

A. No, they didn't.

Q. Can you tell us briefly where they were at the time you went in?

A. Approximately a block away.

Q. That is the last time you observed them?

A. That was.

Q. Did you subsequently after this conversation

(Testimony of Albert Fletcher.)

rejoin [13] these police officers? A. I did.

Q. Did you have a subsequent conversation with Mr. Kelley at a later date? A. I did.

Q. Would that be on or about September 13, 1955? A. It was.

Q. During the period from August 22nd, '55, to September 13, '55, did you have occasion to see the defendant Rayson? A. I did.

Q. Would you state when and where this contact occurred?

A. It would be in the evening about 4:30 at 55th and Long Beach.

Q. That is in Los Angeles? A. It is.

Q. Did you stop to talk to him at that time?

A. I didn't.

Q. You just saw him?

A. I saw him and he waved.

Q. He waved to you? A. He did.

Q. Did you return his wave? A. I did.

Q. At that time were you in a motor vehicle or on foot or what? A. In a motor vehicle.

Q. Were you driving? A. I was.

Q. Where was Mr. Rayson?

A. He was standing on the corner.

Q. You didn't stop? A. I didn't.

Q. And nothing was said?

A. Nothing was said.

Q. Now coming back to September 13, 1955, you state that on that date you saw the defendant Kelley again? A. I did.

(Testimony of Albert Fletcher.)

Q. Would you state where you saw him?

A. In the La Jolla Cleaners.

Q. And the approximate time?

A. Around 12:30.

Q. That would be just after noon?

A. After noon.

Q. Was there anyone else present at that time?

A. There wasn't.

Q. Did you have a conversation with him?

A. I did.

Q. Would you give us the substance of that conversation, [15] as you recall it?

A. After we exchanged greetings that time I told Mr. Kelley that I hadn't—that F. A. had not got in contact with me, and he told me that F. A. had told him that he had seen me and waved at me and that I didn't say anything to him so he just had taken it for granted that I didn't want to see him at that time.

I told him I was interested in seeing him then, and he asked me, could he reach me at that same number.

I told him no, that I had a number that I would give him that he could reach me between the time of 8:00 and 10:30.

Q. Let me interrupt for a moment.

During this conversation did you discuss a possible purchase of narcotics with Mr. Kelley?

A. I did.

Q. What did you say to him in that regard?

(Testimony of Albert Fletcher.)

A. I told him that I wanted to get a couple of ounces of stuff, and he told me to contact Rayson.

Q. Did he say anything about whether or not a sale could be made of the narcotics?

Mr. Neblett: Your Honor please, we object to that as leading.

Mr. Jensen: I will withdraw it.

The Court: Sustained. [16]

Q. (By Mr. Jensen): Did he say anything else in regard to the narcotics?

Mr. Neblett: Your Honor please, we object to that as the same question in a different form. It is leading.

The Court: He has a right to ask him what the conversation was. Overruled.

Mr. Jensen: Would the reporter read the last question to the witness, please.

(The question referred to was read by the reporter as follows: "Q. Did he say anything else in regard to the narcotics?")

The Witness: He told me that after I gave him the number to call me, he told me that Rayson, it would have to be in the morning and that is why I gave the time between 8:00 and 10:00 o'clock.

Mr. Neblett: Your Honor please, we move that his conclusion as to why he gave the time between 8:00 and 10:00 o'clock be stricken out.

The Court: It may go out.

Q. (By Mr. Jensen): Mr. Fletcher, did Mr.

(Testimony of Albert Fletcher.)

Kelley make a statement about when a call could be made?

Mr. Neblett: Your Honor please, that is leading and we object to it on that ground. [17]

The Court: Overruled.

Q. (By Mr. Jensen): Will you answer the question, did Mr. Kelley tell you what time a call could be made? A. He did.

Q. In substance or effect, what were his words in that regard?

A. He told me it would have to be in the morning.

Q. Did you give him a place where you could be called? A. I did.

Q. Did you give him a telephone number?

A. I did.

Q. What telephone number did you give him?

A. Agent Richards'.

Q. Was that the home phone of Mr. Richards?

A. It is.

Q. Had you previously been furnished that telephone number? A. I had.

Q. Who gave it to you? A. Mr. Richards.

The Court: Do you remember the number?

The Witness: I do.

The Court: What is it?

The Witness: PLeasant 1-6408. [18]

Q. (By Mr. Jensen): Was there any more conversation at that time, Mr. Fletcher?

A. It wasn't.

(Testimony of Albert Fletcher.)

Q. Was there a time set for the telephone call?

A. Between the hours of 8:00 and 10:30 in the morning.

Q. On what day?

A. On the following day, the 14th.

Q. This time set was between yourself and Mr. Kelley on that occasion? A. It was.

Q. Did you have occasion to see Mr. Kelley again that day? A. No, I didn't.

Q. Calling your attention to September 14th, the succeeding day, were you at Mr. Richards' house on that occasion? A. I was.

Q. Approximately what time did you first arrive there? A. About 7:30 that morning.

Q. When you arrived there were there other people present? A. There was.

Q. Can you tell us who you recall to be there on that occasion?

A. Mr. Richards, Sergeant Landry, Deputy Farrington [19] and Deputy Stoups.

Q. When you speak of "deputies" you mean officers of the Los Angeles County Sheriff's office?

A. That is right.

Q. Did a telephone call come in at that time?

A. It was a telephone call about 10:00 o'clock that day.

Q. Did you answer the phone? A. I did.

Q. Did you recognize to whom you were speaking? A. I did.

Q. Will you state who it was?

(Testimony of Albert Fletcher.)

A. Eugene Rayson.

Q. Did anyone else listen in at that time to the telephone conversation? A. Yes.

Q. Do you recall who it was? A. Yes, sir.

Q. Who was it? A. Mr. Farrington.

Q. Would you give us the substance or effect of that conversation, as you recall it?

A. When the call first came through and I answered the phone——

Mr. Neblett: If your Honor please, we object to this [20] testimony on the ground there is no foundation laid for this telephone call in that he hasn't said he recognized his voice. He said he recognized who he was talking to, but that is a conclusion.

Mr. Jensen: May I clear the matter up, your Honor?

The Court: Yes, clear it up. As far as I know, he never talked to him before. I don't know.

Mr. Jensen: I will clear it up.

Q. How long have you been acquainted with the defendant Rayson? A. Since 1953.

Q. Have you had prior telephone conversations with Mr. Rayson? A. I had.

Q. Could you give us an estimate of how many?

A. Numerous. I had a whole lot so I couldn't say.

Q. Have you had person-to-person conversations with him? A. I have.

Q. Could you give us an idea how many of those you have had? A. Numerous times.

(Testimony of Albert Fletcher.)

Q. Now coming back to the morning of September 14th, you have stated that you took the telephone call. Will you state whether or not you recognized the voice of the person [21] speaking on the telephone? A. I did.

Q. To whom did it belong? A. Rayson.

Q. Did you have any doubt about that?

A. No, I didn't.

The Court: Did the fellow who was doing the calling give his name?

The Witness: I asked him.

The Court: What did you ask him?

The Witness: I asked when the call first come through, I asked the party—he said, "Hi."

I say, "What did you say?"

He said, "You know who this is?"

I said, "No."

He said, "This is F. A."

Mr. Jensen: Does your Honor have any more questions?

The Court: No.

Q. (By Mr. Jensen): This F. A., is that a nickname that you recognized? A. It is.

Q. To whom does it belong? A. Rayson.

Q. Have you heard other people call him by that name? A. I have. [22]

Q. Could you give us the substance or effect of the conversation that you had on the phone at that time?

(Testimony of Albert Fletcher.)

A. I told him, I said, "The Old Man gave you the number to call me, huh?"

Q. May I interrupt just a moment?

To whom did you refer when you said the Old Man?

Mr. Neblett: Just a moment, please. That is not asking for a conversation, this is a conclusion as to whom he referred to.

The Court: Sustained. He can give the conversation.

Mr. Jensen: If your Honor would set your ruling aside just a moment, I have asked him who he referred to and I think I can show, if your Honor will permit me, whom the other party on that call also understood to be that person. It is no conclusion as to whom he referred to, the present witness, and of course it is my duty to show that the other party understood it to be the same person, which I will also show.

Mr. Neblett: I think it is a conclusion, your Honor, as to who he referred to. That still is not a fact, it is just what he thinks of the conversation.

The Court: I think that he can give the conversation. That was the original question. I sustained the objection.

Mr. Neblett: I don't have any objection to the conversation, actually what was said, but as to whom he referred to [23] is a different matter.

Q. (By Mr. Jensen): State what occurred during the telephone conversation at that time.

(Testimony of Albert Fletcher.)

A. At that time I said, "The Old Man gave you the number?"

He says, "Yes," he said, "you wanted to see me?"

I said, "Yes, I would like to see you."

He said, "Well, where are you? The 50s, the 60s or the 70s?"

I said, "In the 50s."

He said, "Well, I am fixing to leave home and you can meet me in about 15 minutes at 58th and Hoover."

Q. Was anything further said at that time?

A. Yes. I told him that I wanted to get two ounces of stuff, and he told me to meet him at 58th and Hoover.

Q. Was anything said about price?

A. I don't recall on that occasion at that time.

Q. Did you leave after this telephone conversation?

A. I did.

Q. Did you leave by yourself?

A. I did.

Q. Did you have your car there?

A. I did.

Q. Would you tell us where you went and how you got [24] there?

A. When I left the house I was furnished with \$860 worth of advance money from Mr. Richards. I was searched before I got in my car and my car also was searched. And I proceeded to meet Rayson at 58th and Hoover.

The Court: What do you mean searched?

(Testimony of Albert Fletcher.)

The Witness: I was searched in person. I was going to——

The Court: Who searched you?

The Witness: The agents, Mr. Richards and Deputy Farrington.

The Court: Then they went out and searched the car?

The Witness: My car was searched.

The Court: By whom?

The Witness: Mr. Richards and Deputy Farrington.

The Court: All right.

Mr. Neblett: Pardon me. How much money was that he gave him?

Mr. Jensen: The witness testified \$860.

Q. Did you park the car in the vicinity of 58th and Hoover? A. At 58th and Hoover.

Q. Did you observe while you were driving down there whether or not you were followed or accompanied by anyone else? [25] A. I was.

Q. By whom?

A. Agent Richards and Deputy Farrington.

Q. Were they in another car?

A. They was.

Q. After you arrived at 58th and Hoover, did you have occasion to see the defendant Rayson?

A. I did.

Q. How did he approach?

A. I was parked on the northeast side of Hoover and he approached me coming from south to north

(Testimony of Albert Fletcher.)

and pulled about 30 feet ahead of me toward the curbing and I pulled up behind him.

Then he started his car off again and made a right turn on 57th Street and proceeded halfway in the block.

Q. Did he stop again?

A. He stopped and I also stopped.

Q. Did you have a conversation with Mr. Rayson at that time? A. I did.

Q. Where exactly did it occur?

A. In my car. He got out of his car and came to my car and got in my car.

Q. Was there anyone else present during that conversation? [26] A. No, there wasn't.

Q. Was there anyone with Mr. Rayson at the time he drove up in his car? A. There wasn't.

Q. Would you state approximately what time was this when you met him?

A. Approximately about——(pause)

Q. Was this right after the telephone conversation?

A. It was about 15 minutes after the telephone conversation; about 10:45.

Q. You say about 10:45? A. 10:45.

The Court: A.m.?

The Witness: A.m.

Q. (By Mr. Jensen): Would you state what the substance or effect of that conversation was?

A. Well, I told him that I had spoke to Mr. Kelley and that I wanted, I told him that I wanted

(Testimony of Albert Fletcher.)

to get a couple of ounces of stuff, and that I would like to get a better deal than the deal that I had previously been getting before.

He told me that I would have to buy more than two ounces, and I could get it for \$275, but I would have to pay \$300 an ounce, \$350 an ounce for from one to two ounces.

Q. Was there any other conversation, any additional [27] conversation?

A. Yes, he told me to go back where I was waiting at the telephone, where he had contacted me, and that he would contact me in about an hour.

Q. After that conversation did you return to Mr. Richards' home? A. I did.

Q. Did you remain there for some time?

A. I did.

Q. Did a telephone call come in while you were waiting there? A. It did.

Q. Do you recall the approximate time of this telephone call?

A. Around noon, just about noon.

Q. Who answered the phone? A. I did.

Q. Did you recognize the voice that you heard on the phone at that time? A. I did.

Q. Would you state whose voice it was?

A. Rayson's.

Q. Was there anyone else present at the time of that conversation? A. It was. [28]

Q. Will you state who else was present?

A. Mr. Richards and Deputy Farrington.

(Testimony of Albert Fletcher.)

Q. Did either Mr. Richards or Mr. Farrington listen to any part of this conversation?

A. Mr. Farrington did.

The Court: What do you mean by listened? You mean to say he listened to what you said or did they listen in on the telephone?

The Witness: He listened in on the telephone. I had the telephone up to my ear and he also listened in too. We had the phone fixed so both of us could listen.

The Court: On the same receiver?

The Witness: On the same receiver.

Q. (By Mr. Jensen): Would you state the substance and effect of the conversation that you had on the telephone at that time?

A. After the telephone call I answered the phone and Rayson told me that he couldn't, at that time he couldn't do anything. He couldn't get me anything right then because the party he had to see was not at home, and that it would have to be about 5:00 o'clock that evening.

I told him that I couldn't make it at 5:00 o'clock because I had someone to pick up at 5:30, and he told me to wait a while. He started to give me a number, and he called out the first five numbers but he didn't give me a prefix. [29] He told me to wait, that he would call me back in about five minutes.

Q. Was that the end of the conversation?

A. It was.

Q. Did you have another conversation on the

(Testimony of Albert Fletcher.)

telephone a little later? A. I did.

Q. About how much later?

A. About four or five minutes later.

Q. Did you answer that call?

A. I did.

Q. Did you recognize the voice of the person to whom you were talking? A. I did.

Q. Who was it, please?

A. Rayson.

Q. Would you state the substance of that conversation?

A. Well, he told me that that would be the earliest that he could take care of the business, and I told him that I wanted to do it, if he could I wanted him to do it before night because I didn't want to wait until night.

So he told me that he couldn't, and I also told him that I had this sum of money and I didn't like to carry it around, did he want to take the money at that time.

He told me yes, and we set a time of 6:30 that he would [30] call me at this number at 6:30 that night, and he told me to meet him this time in 15 minutes at 58th and Main.

The Court: Is this the 6:30 call you are talking about?

The Witness: No, this is on the same call.

Mr. Jensen: Let me clear that up, your Honor.

Q. As I understand it——

Mr. Neblett: May I inquire also, we are still talking about the 14th now?

(Testimony of Albert Fletcher.)

The Court: The 14th, as far as I know.

Mr. Jensen: That is correct. We are talking about a telephone conversation——

Q. Is this correct, Mr. Fletcher, you are now relating to us what was said in the telephone conversation that occurred a little after noon, just a few minutes after noon, on September 14th with the defendant Rayson, the second of two calls that came in very close together, is that correct?

A. That is correct.

Q. If I understand you correctly, you are stating that in this same conversation you were to meet him within 15 minutes or so at 58th and Main?

A. That is right.

Q. You were also to expect a telephone call at 6:30 p.m. in the evening?

A. That is right.

Q. And both items were brought out in the same telephone [31] conversation as being the one just after noon?

A. It was.

Q. Was there anything else said during that conversation?

A. It was.

Q. Can you tell us the balance of the conversation?

A. He also gave me a number to call him, and if he wouldn't be there to answer the phone, if anyone else would answer the phone, to tell him that White Mercury called.

Q. After that telephone conversation, did you leave Mr. Richards' home?

A. I did.

Q. Where did you go?

A. To 58th and Main.

(Testimony of Albert Fletcher.)

Q. Did you go in your automobile?

A. I did.

Q. Did you observe whether or not you were followed or accompanied? A. I did.

Q. Were you? A. I was.

Q. By whom?

A. Mr. Richards and Deputy Farrington.

Q. When you got down to 58th and Main, did you stop? A. I did. [32]

Q. Did you see Mr. Rayson?

A. No, I didn't.

Q. At the time of your stopping?

A. No.

Q. Did you see him subsequently?

A. I did.

Q. There at 58th and Main?

A. At 58th and Main.

Q. Did you have a conversation with him at that time? A. I did.

Q. Was there anyone else present during the conversation? A. It wasn't.

Q. Would you state what was said on that occasion? A. I gave him the money.

Q. How much money did you give him?

A. \$700.

Q. What was said?

A. He told me—he repeated again that the Old Man said that I could have the same deal that I once got before for the same price if I would buy over two ounces.

Q. Was anything else said?

(Testimony of Albert Fletcher.)

A. Yes, he also told me that when he got out of his car to come over to mine, that he had skinned the bulk off his knee. [33]

Q. Was there anything else in addition to that?

A. No, that was all.

Q. Did you then leave that area in your car?

A. I did.

Q. Where did you go at that time?

A. Back to Agent Richards' house.

Q. Now, prior to that meeting, had you been searched again as before? A. I had.

Q. Was your vehicle searched?

A. It was.

Q. Upon your return to Mr. Richards' house were you searched again? A. I wasn't.

Q. Did you have any money left?

A. I did.

Mr. Neblett: Your Honor please, that is incompetent, irrelevant and immaterial. We object to it on that ground.

The Court: The only problem here, the testimony was he was given \$860 and he paid out \$700. Objection overruled.

Q. (By Mr. Jensen): Did you have any money left in your possession? A. I did.

Q. How much did you have? A. \$160.

Q. Did you give that to someone?

A. I did.

Q. To whom? A. Agent Richards.

Q. Now calling your attention to later in the day on September 14th at approximately 6:30 p.m.

(Testimony of Albert Fletcher.)

in the evening, would you state where you were on that occasion or at that time?

A. At Mr. Richards' house.

Q. What time did you arrive there?

A. About 6:00 o'clock.

Q. Were there other people present at that time? A. It was.

Q. Will you state who else was present?

A. Mr. Richards, Deputy Farrington and Deputy Stoups.

Q. How long did you remain there at Mr. Richards' house on this occasion?

A. Until approximately 6:30 when I received the call.

Q. A telephone call came in? A. It did.

Q. About what time did that telephone call come in? A. About 6:30.

Q. Did you answer the phone?

A. I did.

Q. Did you recognize the voice of the person speaking? [35] A. I did.

Q. Will you state who that was?

A. Rayson.

Q. Would you tell us whether or not anyone listened in to that conversation?

A. Deputy Farrington did.

Q. Did Agent Richards listen in to any part of that conversation? A. I can't recall.

Q. Would you give us the substance or effect of that conversation, please?

A. Rayson told me to go to Budlong and Slau-

(Testimony of Albert Fletcher.)

son, that there was an R and R sign by the tracks.

The Court: You say it was Budlong and Slauson?

The Witness: It was a railroad sign with RRs on it. And he told me to look at the base of this sign, that there was a bag with a bottle and on top of it this package, that I could pick it up.

Q. (By Mr. Jensen): Was there anything else said? A. No, it wasn't.

Q. After this telephone conversation, did you leave Mr. Richards' home? A. I did.

Q. Did anyone accompany you? [36]

A. Mr. Richards did.

Q. Whose car did you leave in?

A. Mine.

Q. Who drove? A. I did.

Q. Where did Mr. Richards sit?

A. On the side of me.

Q. In the front seat? A. Front seat.

Q. Where did you drive him?

A. To Budlong and Slauson, which has a sign——

Q. Wait a minute. Which street were you actually on? A. 56th.

Q. What street is the sign actually on?

A. On Budlong.

Q. Did you drive along Budlong?

A. I did.

Q. Did you observe a railroad sign?

A. I did.

Q. Where was it in relation to this street?

(Testimony of Albert Fletcher.)

A. (Pause.)

Q. I am sorry. I will rephrase it. Will you tell us where this sign was?

A. At Budlong right near the tracks.

Q. A little more specifically, where was it from the [37] road you were driving on?

A. From Slauson.

Q. You misunderstand me, Mr. Fletcher. I want a little better physical description of the scene there that you saw at Budlong where you saw the RR sign. Will you state to the court how far the sign was away from the road?

A. Right on the side.

Q. How far? What is your estimate of the distance? A. About two feet.

Q. Did you observe anything there at the side?

A. I pulled to the side and Mr. Richards got out of the car and picked up the package.

Q. Did you see——

Mr. Neblett: If you will excuse me just a minute. Your Honor please, we move that that "picked up the package"—he may have picked up a package but I think he is referring to the package now which is probably a conclusion.

The Court: It may go out.

Q. (By Mr. Jensen): Did you observe what Mr. Richards did when he got out of the car?

A. I did.

Q. What did he do?

A. He stooped down and picked up a package from the [38] side of the sign.

(Testimony of Albert Fletcher.)

Q. You say "a package." What color was it?

A. Brown paper bag.

Q. Did you observe a bottle or anything in the vicinity of the package? A. I did.

Q. Where was it?

A. The bottle was on top of the package.

Q. Did Mr. Richards get back in your car?

A. He did.

Q. Where did you go after that?

A. Back to his house.

Q. Back to Mr. Richards' house?

A. Back to Mr. Richards' house.

Q. Did you have any subsequent conversations with the defendant Kelley after September 14th, 1955? A. I did.

Q. I call your attention to approximately September 22, 1955, and I will ask you whether or not you had a conversation with the defendant Kelley at that time. A. I did.

Q. Would you state where that conversation took place?

A. In front of the La Jolla Cleaners.

Q. That is the same La Jolla Cleaners that you spoke about before? [39]

A. That is right.

Q. Approximately what time of day did that conversation take place?

A. I think it was around—it was in midafternoon.

Q. Your memory is that it was in midafternoon?

A. It was.

(Testimony of Albert Fletcher.)

Q. Was there anyone else present at that conversation? A. It wasn't.

Q. Where was Mr. Kelley at that time?

A. He was sweeping the side of the street.

Q. In front of the La Jolla Cleaners?

A. Yes.

Q. Will you state to us what you said on that occasion?

Mr. Neblett: Now, if your Honor please; we object to that on the ground it is incompetent, irrelevant and immaterial.

I assume that counsel is trying to prove a conspiracy. The conspiracy is completely consummated by this time and declarations made after the conspiracy are inadmissible on the ground that they are hearsay and incompetent, irrelevant and immaterial.

Also if it is supposed to be offered for the purpose of proving the other two counts in the indictment, possession and transportation and sale, it is incompetent, irrelevant [40] and immaterial for those purposes for the same reasons I have stated.

The Court: Overruled.

Q. (By Mr. Jensen): Would you state what the substance and effect of the conversation was that you had with the defendant Kelley on the occasion of your seeing him on September 22, 1955, while he was sweeping the sidewalk in front of the La Jolla Cleaners?

A. We exchanged greetings again and I told Mr. Kelley that I had told Rayson to see if he could

(Testimony of Albert Fletcher.)

get a better deal from him for me, and I asked Mr. Kelley, had he talked to him.

He told me no, that he hadn't talked to him, and he also stated that Rayson had been trying to get in touch with me a previous time before that, and he had called this number and I wasn't there and I told him I was trying to get in touch with him.

Q. Were any further statements made relative to narcotics? A. It was.

Q. What were they?

A. I asked him, could he give me a better deal, and he told me that I would have to talk it over with Rayson.

Q. Was there anything else said?

A. Yes, he did say—I can't recall all that was said [41] in that conversation.

Q. Have you had any conversations or contacts with the defendant Kelley since that time?

A. Had I had any?

Q. Since that time.

A. No, I haven't.

Q. From September 22, 1955, or thereafter did you have an occasion to get in touch with the defendant Rayson? A. I did.

Q. Or did he get in touch with you, either one—pardon me.

A. He got in touch with me the next day, the following day.

Q. That would be September 23rd?

A. I think it was.

Q. How did he get in touch with you?

(Testimony of Albert Fletcher.)

A. He called Agent Richards' house.

Q. Do you recall approximately what time that telephone call came in?

A. No, I can't recall that at this moment, but it was in the morning.

Q. Were there other people present there besides yourself? A. It was.

Q. Would you state who they were? [42]

A. Agent Richards and Sergeant Landry and Deputy Farrington and Deputy Stoups.

Q. Did you answer the phone when that call came in? A. I did.

Q. Did you recognize the voice of the person to whom you spoke on the phone at that time?

A. I did.

Q. Will you state who it was?

A. Rayson.

Q. Would you state what was said during that conversation?

Mr. Neblett: If your Honor please, we still object to this on the ground that it is incompetent, irrelevant and immaterial, because he is trying to lay a state of facts for *res gestae* or something on an offense which took place after the date of the offense charged in the indictment.

The Court: Overruled.

Q. (By Mr. Jensen): Would you give us the substance of that conversation?

A. When he called I told him that I would like to get the same deal that I had got from him before,

(Testimony of Albert Fletcher.)

and we made arrangements to meet around 1:00 p.m. that day at 49th and Hoover.

Mr. Neblett: Your Honor please, we move that the answer [43] beginning with the arrangements go out on the ground it is a conclusion.

The Court: How can the acts of the defendant after the 22nd have any materiality upon this charge? What is your theory?

Mr. Jensen: We intend to show this is an additional overt act as a part of the conspiracy which we charge in Count 1 of the indictment, your Honor.

The Court: Mr. Neblett, supposing the Government alleges a conspiracy and sets forth three or four overt acts. Are they limited to those overt acts?

Mr. Jensen: No, your Honor. They may either show more or less, as I understand the law.

The Court: I am asking Mr. Neblett.

Mr. Jensen: Excuse me.

Mr. Neblett: Excuse me, your Honor. I didn't hear you.

The Court: Supposing they are alleging a conspiracy and they allege two or three overt acts. At the time of the trial and proof, are they limited to those overt acts or can they show additional overt acts?

Mr. Neblett: They may show additional overt acts, your Honor. That is the rule, as I understand it. But you can't show an overt act which has taken

(Testimony of Albert Fletcher.)

place subsequent to the conspiracy charged has been fully consummated. [44]

We didn't bring our brief up this morning, but we have cases right on the point on that score, that you cannot show anything that tends to be an overt act or tends to prove an overt act subsequent to the time of the consummation of the conspiracy.

Now according to this witness' testimony, this conspiracy was completely consummated, that is, the one charged in the indictment, when he and Mr. Richards went down to this railroad sign at Budlong and Slauson and picked up a bag, which I assume was the heroin he was talking about, contained the heroin he was talking about.

So this is all immaterial after the consummation of the conspiracy.

The Court: Supposing this is a continuing conspiracy? Supposing it is not just a conspiracy limited to that time, but it is a continuing conspiracy, that there was a conspiracy up until the time of the arrest?

Mr. Neblett: Well, if your Honor please, they would have to charge it in an indictment or they couldn't show it here.

Mr. Jensen: I think we have, your Honor.

The Court: They don't say a conspiracy for any definite length of time, do they?

Mr. Neblett: It is charged that the conspiracy was fully consummated on September 14, 1955, and there is nothing [45] charged in the indictment after that date.

(Testimony of Albert Fletcher.)

Mr. Jensen: I disagree with counsel in that. I don't think we are limited to September 14th.

The Court: Let's read the count. It states to and including October 6, 1955.

Mr. Neblett: I didn't notice that, your Honor.

The Court: The objection is overruled. Do you remember the question now?

Mr. Jensen: No, your Honor. I am afraid I am lost.

(The record referred to was read by the reporter as follows:)

("Q. Would you give us the substance of that conversation?

("A. When he called I told him that I would like to get the same deal that I had got from him before, and we made arrangements to meet around 1:00 p.m. that day at 49th and Hoover.'")

Q. (By Mr. Jensen): As I recall, you were relating the telephone conversation that you had with Rayson. A. It was.

Q. Would you give us all of that conversation, please?

A. We made arrangements to meet about 1:00 o'clock that day, and before I left, still at the house and before I left the house, I was given \$700 from Mr. Richards and—— [46]

Q. Wait a minute. Let us stay with the conversation a moment. Was that all the conversation that you had?

A. That was all the conversation I had.

(Testimony of Albert Fletcher.)

Q. Did you subsequently leave the house?

A. I did.

Q. Where did you go?

A. To 49th and Hoover.

Q. Did you see there either of the defendants at that time? A. I did.

Q. Who did you see? A. Rayson.

Q. Did you have a conversation with him at that time?

A. No. He was turning the corner at the time and my car was parked the opposite way from him, and he beckoned for me to start up my motor, and he made a turn behind me and I turned right on Hoover and proceeded for about a block, I made a left turn and he made a right turn also, and he went about two blocks and I didn't see him any more. We circled the block and I didn't see him any more until about a half hour or 45 minutes afterwards.

Q. When you saw him this half hour or 45 minutes later, did you stop and have a conversation?

A. I pulled up beside his car and I asked him what had [47] happened, and he told me that someone had beat him for the package where he had placed it.

Q. I am sorry. I didn't hear that.

A. Someone had stolen the package from where he had placed it, and that he would have to see me later that day.

Q. Was there anything further said?

A. No, there wasn't.

(Testimony of Albert Fletcher.)

Q. Did you have any occasion to see the defendant Kelley or the defendant Rayson after that time? A. I did.

Q. Which one did you see?

A. Rayson.

Q. When did you next see him?

A. I went over to his place of business.

Q. I am not asking you where. Will you give us an approximate time or date the next occasion you saw Rayson? Was it the same day?

A. That same day.

Q. Where was it that you saw him?

A. Over on Jefferson and Main.

Q. Did you have a conversation with him at that time? A. I did.

Q. Was there anyone else present at the conversation? A. There wasn't.

Q. What was said? [48]

A. I asked him, was he able to take care of me then. He told me no, that that was the last two that the Old Man had given him and he didn't have any more right then, that it would be about two or three more days.

Q. Was there any additional conversation?

A. There wasn't.

Q. Have you had any occasion since that time to see or talk to either of the defendants Kelley or Rayson? A. I did.

Q. When was that?

A. I can't recall the date, which date.

Mr. Jensen: May I have a moment, your Honor?

(Testimony of Albert Fletcher.)

(Conference between counsel.)

Mr. Jensen: Does your Honor expect to go on until 12:00 o'clock?

The Court: Yes.

Q. (By Mr. Jensen): Mr. Fletcher, going back in your testimony a little bit, I call your attention to the word that you used in these conversations of "stuff." Would you state whether or not that word has any particular meaning to you as you used it?

A. I do.

Q. What does it refer to? A. Heroin.

The Court: What do you call marihuana?

The Witness: Purr, various names.

The Court: What do you call opium?

The Witness: I never had any dealings with opium.

The Court: "Stuff" is heroin?

The Witness: The password, stuff.

The Court: It doesn't refer to opium, marihuana or any other drug?

The Witness: Not that I know of.

Q. (By Mr. Jensen): Prior to August of this year have you had any transactions with the defendant Kelley or the defendant Rayson?

A. I have.

Q. Would you state when those transactions occurred, as near as you can recall?

A. From the period of around October 1953.

Q. Let me put it this way to you, Mr. Fletcher: How many prior transactions have you had with

(Testimony of Albert Fletcher.)

the defendant Kelley or the defendant Rayson, approximately, your best memory?

Mr. Neblett: If your Honor please, to what transactions is the District Attorney referring?

The Court: I don't know what transactions he means.

Mr. Jensen: I will withdraw it and reframe it.

Q. Had you had any contacts with either the defendant Kelley or the defendant Rayson in which you offered to purchase narcotics from them prior to August 1955? A. I have.

Q. Would you state to us your best memory on how many occasions you contacted either or both of them, or they contacted you, relative to the sale of narcotics?

A. I couldn't count the times.

Q. Can you give us your best judgment? Were there two or three, four or five, or what?

Mr. Neblett: Your Honor please, we would like to have this divided as to which one he had his conversation with.

Q. (By Mr. Jensen): Let's take it with the defendant Kelley for a moment.

Prior to August——

The Court: May I ask this witness a question?

Mr. Jensen: Certainly.

The Court: Are you a user?

The Witness: No, I am not.

The Court: All right.

Q. (By Mr. Jensen): Prior to August of 1955, on how many occasions—if you don't recall the

(Testimony of Albert Fletcher.)

exact occasions give us your best memory on it—on how many occasions have you contacted the [49b] defendant Kelley relative to the purchase or sale of narcotics?

A. Two or three times.

Q. And would you state as to the best of your memory when those contacts occurred?

A. In 1953, around October, I had one conversation with the defendant Kelley.

Q. Were there any thereafter?

A. In 1954 I had maybe one or two.

Q. Now on these prior contacts, can you fix for us with any more certainty the time in '54 that you contacted Kelley?

A. About January 19th.

Q. You said there may have been one or two. Were they both in January or were they at a subsequent time?

A. At subsequent times.

Q. Taking the ones that occurred in October of 1953, do you recall where it was that you saw the defendant Kelley?

A. La Jolla Cleaners.

Q. Do you recall any of your conversation that you had with him at that time?

Mr. Neblett: Your Honor please, I don't know what the purpose of this is. I can't *devine* it myself. It seem to me it is all incompetent, irrelevant and immaterial. The defendants are not charged with any conspiracy, or maybe he [49c] is trying to show a defense to entrapment. We haven't

(Testimony of Albert Fletcher.)

brought that up yet, but I think it is a little premature at this time.

The Court: What is your theory here?

Mr. Jensen: I have two theories, if your Honor please. One is that I wish to show the pattern of those transactions for the purpose of showing that the defendant Kelley's actions were intentional and knowingly, that he knowingly entered into these later engagements that we have had testimony on in detail. In other words, his state of mind or his criminal intent.

Secondly, I think that your Honor can admit it on the basis of our having charged that this conspiracy to violate the laws of the United States commenced prior to the date of the commission of the first overt act.

The Court: You mean "prior" extends back over a couple of years?

Mr. Jensen: Well, it is the Government's theory, if your Honor please, that this was a continuing arrangement.

The Court: As I read the indictment, "prior" means a few days or maybe a week or two, maybe a month or so, but a couple of years seems like it is too far back, isn't it? You mean to say a continuing conspiracy here?

Mr. Jensen: I think, if your Honor please, that we can show anything within the statute of limitations with respect [49d] to that, if it is our theory that the conspiracy lasted that long.

But even if your Honor will not go along with

(Testimony of Albert Fletcher.)

us on that, I think that a prior transaction of almost identical circumstances can, in the court's sound discretion, be admitted to show the state of mind of the defendant who was engaged in it. In other words, whether or not he was acting knowingly and acting unlawfully.

The Court: Objection sustained.

Q. (By Mr. Jensen): You have used the phrase—and I quote you, Mr. Fletcher—"Old Man." Would you state to the court whether or not that is a nickname or a particular reference to—

Mr. Neblett: Your Honor please, we object to that as calling for a conclusion of the witness. He didn't say anything about the Old Man. That was said by Rayson, according to his testimony, that the Old Man was always referred to by Rayson, according to this witness' testimony. This witness hasn't ever called anybody the Old Man, and we object to it on that ground. It is calling for a conclusion of the witness and it is incompetent, irrelevant and immaterial in any event.

Mr. Jensen: I think the record actually shows that both Rayson and the witness used the term, but be that as it may I think I can show the reference that is associated in this [49e] man's mind with that term.

The Court: He just got through saying a moment ago, "The Old Man did so-and-so"; somebody was talking to him, "the Old Man did so-and-so."

Mr. Jensen: But, if your Honor please, I can clear the matter up. I will withdraw the question as

(Testimony of Albert Fletcher.)

such if you will give me an opportunity to, and without prejudice to my renewing it again.

The Court: Clear it up. Let's see who the Old Man is.

Q. (By Mr. Jensen): Is there anyone that you refer to as the Old Man? A. Yes.

Mr. Neblett: That is too general. I commanded at least 20,000 troops in my various positions in the Army and they all called me the Old Man, even though I was younger than most of them.

Mr. Jensen: I have to start somewhere, your Honor. I can narrow it down from there, I think.

The Court: Overruled.

Q. (By Mr. Jensen): Do you use the term "Old Man" to refer to anybody in particular, Mr. Fletcher? A. I do.

Q. To whom did you refer when you used that term? A. Mr. Kelley. [49f]

Mr. Neblett: Your Honor please, we move that that be stricken—maybe I will withdraw that.

The Court: When you say "Old Man," can't he say, "When I say 'Old Man' I mean Mr. Kelley?"

Mr. Neblett: I move that it be stricken out.

The Court: Denied.

Q. (By Mr. Jensen): Have you heard other people refer to Mr. Kelley as "Old Man," Mr. Fletcher? A. I have.

Q. Have you heard the defendant Rayson refer to Mr. Kelley as the Old Man?

A. I have.

(Testimony of Albert Fletcher.)

Q. Was the reference ever used in Mr. Kelley's presence? A. No, not that I know of.

Q. Now you have stated, as I recall, that you have had numerous conversations with the defendant Rayson. A. I have.

Q. During those conversations have you had occasion to refer to the defendant Kelley?

A. I have.

Q. What term was used as reference to Mr. Kelley during those conversations?

A. The Old Man. [49g]

Q. Do you use it in reference to anybody else, or have you, within the last year or two years?

A. I haven't.

Q. Do you know of anyone that Mr. Rayson uses it in reference to? A. I do.

Q. Who is that? A. Mr. Kelley.

Q. Mr. Fletcher, how long have you been in contact with people or yourself had contact with narcotics or the business of buying, selling and transporting narcotics? A. Since 1940.

Q. And you have prior convictions for possession of narcotics, have you not?

A. I have.

Q. Would you state when the first of those occurred? A. 1940.

Q. Where? A. In New Orleans.

Q. Was that in a State or United States court?

A. Federal.

Q. Have you had a subsequent conviction?

(Testimony of Albert Fletcher.)

A. I have.

Q. Where did that occur?

A. In Los Angeles. [49h]

Q. Approximately when? A. 1949.

Q. Was that in the State or United States court?

A. In State court.

Q. State of California court? A. Yes.

Q. Now during the years from now to 1940, have you generally referred to heroin as "stuff"?

A. I have.

Q. Have the other people that you have contacted or have contacted you in reference to narcotics or the sale of them referred to heroin as "stuff"? A. They have.

Q. Is that a generally accepted word for people that are engaged in this business, that is, "stuff" for heroin? A. That is one.

Q. It is one? A. That is one of them.

Q. Does it ever refer to anything else other than heroin?

A. I never used the term for anything else.

The Court: May I ask a question?

Mr. Jensen: Certainly.

The Court: You said a little while ago that you were not a user, and when you were convicted down in New Orleans in [49-I] 1940 you must have been a pusher, is that right?

The Witness: It was possession.

The Court: Well, for what purpose?

The Witness: I was—that is right—I was taking

(Testimony of Albert Fletcher.)

some narcotics out of a drug store. That is what I was convicted for.

The Court: That was your possession, was it?

The Witness: That was my possession.

The Court: You stole the narcotics?

The Witness: That is right.

The Court: Well, in Los Angeles in 1949, were you a pusher in 1949?

The Witness: I was.

The Court: That is all.

May I inquire, in 1949, this conviction, was this conviction for a felony in 1949?

Mr. Jensen: They were both felony convictions, as I understand it.

The Court: The reason I am asking, the State courts give 30, 60 or 90 days sometimes.

Mr. Jensen: My understanding, although I make this representation without having actually checked the record, is that they are felony convictions.

Mr. Neblett: May I interrupt at this time? It is probably out of order, but I have a certified copy of his conviction [49-J] here in the State court from the Los Angeles Superior Court, and he was sentenced to 1 to 14 years on a plea of guilty.

The Court: That must have been a felony.

The Witness: I was not on 1 to 14. I never have been sentenced to 1 to 14.

Mr. Jensen: He probably means serving it.

The Court: You may use that on cross examination.

Mr. Neblett: Very well. I thought I would in-

(Testimony of Albert Fletcher.)

interrupt while the court was asking the question.

The Court: I was wondering whether this offense in Los Angeles was in the nature of a violation of the Health and Safety Act, whether it was a misdemeanor or whether it was a felony. Evidently it was a felony. Evidently it was a felony.

Mr. Jensen: I don't believe I have any further questions, your Honor.

The Court: Well, it is nearly 12:00 o'clock and I suspect that we had better take a recess now rather than start your cross examination. I anticipate the cross examination may take some time.

Mr. Neblett: It will, your Honor.

The Court: Now do you think we are going to have any difficulty in finishing this case tomorrow?

Mr. Jensen: Well, your Honor, I have some corroborating [49-K] witnesses that I don't think will be overly long, and one expert. That is for myself. Of course I don't know about the cross examination, and I may have some redirect examination.

The Court: This is your case in chief?

Mr. Jensen: With the corroborating witnesses and the expert, that would be my case in chief; yes, your Honor.

The Court: I see no necessity of coming back at 1:30. We will now recess to 2:00 o'clock this afternoon.

(Whereupon, at 11:50 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [49-L]

November 29, 1955, 2:00 o'clock p.m.

The Court: You may proceed.

Mr. Jensen: If the court please, I have one or two questions I overlooked this morning, if I might have the witness a moment or two on direct examination.

The Court: All right.

NORMAN FLETCHER

the witness on the stand at the time of recess, having been previously duly sworn, was examined and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Jensen): Mr. Fletcher, you understand you are still under oath and testifying in this case? A. Yes.

Q. I would like to call your attention again to the conversation that you have testified about which occurred on September 22, 1955, with the defendant Kelley, and ask you whether or not you discussed that with me a little at length during the lunch hour and whether or not you made a mistaken statement this morning about when that conversation occurred, as to the time of day.

A. I did. [50]

Q. Is your memory now clear in respect to when that conversation actually took place?

A. Yes.

Q. When was it?

(Testimony of Norman Fletcher.)

A. On the 22nd.

Q. And at what time of the day?

A. About 10:30.

Q. Is that in the morning?

A. In the morning.

Q. You have also testified that subsequent to that you had two meetings with the defendant Rayson, and I think you testified that was the following day. Are you still of that memory or do you wish to change your testimony?

A. I wish to change it.

Q. What is the fact about the subsequent two meetings with the defendant Rayson?

A. It was the same day, that evening.

The Court: That evening?

The Witness: Yes.

Q. (By Mr. Jensen): That is September 22, rather than the 23rd. A. That's right.

Q. That was still in the afternoon or evening of the 22nd? A. Yes. [51]

Q. I will ask you whether or not at either of those two meetings with the defendant Rayson you delivered to him any money. A. I did.

Q. And at which of those two meetings?

A. On the first one.

Q. How much money did you deliver to him?

A. \$700.

Q. Did you have any conversation in respect to that money at that time? A. I did.

Q. And what was that conversation?

A. He told me that someone had stole the pack-

(Testimony of Norman Fletcher.)

age and that he didn't have any more, that was all that the old man had given him, and that he would have to contact him, and that he would call me back in an hour.

The Court: Did you give him the \$700?

The Witness: I did.

The Court: Did you ever get it back?

The Witness: I did.

The Court: When did you get it back?

The Witness: I went to his place later on. After I did not receive a call in an hour, I went over to his place.

The Court: Was that on the same day?

The Witness: It was. [52]

The Court: The 23rd?

The Witness: The 22nd.

The Court: 22nd. All right.

Q. (By Mr. Jensen): This is the second time you had paid him \$700, is it not? Answer audibly so we can hear.

Mr. Neblett: Excuse me a minute. May I have counsel clarify what he means by the second time? Is this the same \$700 or another \$700?

Mr. Jensen: This is another \$700.

Q. You have testified, have you not, and it is a fact that you gave the defendant Rayson \$700 on September 14, is that correct? A. Right.

Q. You have already related the details of that?

A. I have.

Q. You are now stating to us on the afternoon

(Testimony of Norman Fletcher.)

of September 22 you gave him another \$700, is that correct? A. That's right.

Q. And that \$700 was returned to you?

A. That's right.

Q. Later that same day? A. It was.

Q. September 22? A. Yes.

Q. Upon the return of that money, did you have a conversation [53] with the defendant Rayson?

A. I did.

Q. What was said at that time?

A. He told me that he had contacted the old man and that was all he had and that maybe in a few days to contact him, that something might be happening.

Q. Is that all the conversation you had at that time? A. That's all I can remember.

Mr. Jensen: May I have this marked for identification?

The Court: It may be marked for identification.

The Clerk: Exhibit 1 for identification.

(The exhibit referred to was marked as Government's Exhibit No. 1 for identification.)

Q. (By Mr. Jensen): Mr. Fletcher, I show you what has been marked United States Exhibit 1, being a photograph, and ask you whether or not that scene is familiar to you.

A. It is.

Mr. Neblett: Your Honor please, we object to his testifying from a photograph which is not yet admitted in evidence.

(Testimony of Norman Fletcher.)

The Court: How can he get it admitted in evidence if it isn't identified?

Mr. Neblett: Well, that is true, your Honor, but what I mean is there is no information laid for its admission.

The Court: He hasn't offered it in evidence yet. They are trying to lay a foundation. I don't know whether they can [54] lay a foundation or not. Go ahead.

Q. (By Mr. Jensen): Would you state what that is a scene of, Mr. Fletcher?

A. Of Budlong and Slauson.

Q. Which *is* street is running through the photograph from the bottom of the picture up to the top, which street is that? A. Budlong.

Q. Would you tell us where, as you look into that picture, Slauson would be headed, down that road or behind you?

A. It would be ahead.

Q. I notice in the picture there is a R.R. sign. Will you state whether or not that is the R.R. sign where you stopped? A. It is.

Q. And is that where Mr. Richards picked up the package? A. It was.

Q. Would you say this is a fair representation of the scene as it existed at the time that you and Mr. Richards stopped there? A. I would.

Mr. Neblett: If your Honor please, I object to this as incompetent, irrelevant and immaterial, no foundation having been laid for its admission, and yet he is testifying to all [55] the facts shown on

(Testimony of Norman Fletcher.)

the photograph and the photograph has not been offered.

The Court: He is getting ready to offer it as soon as this witness says it is a fair representation.

Mr. Neblett: I understand, but what is happening is he is asking him what the photograph shows. Is it a fair representation? Is this the place where he picked up the heroin? He has already proved everything he wants. He may not even offer the photograph in evidence. If I were in his place, I wouldn't, if that is all in.

The Court: Then you can offer it, if you want. The objection is overruled.

Q. (By Mr. Jensen): Was your answer in the affirmative? A. Yes.

Mr. Jensen: Your Honor, we will offer United States Exhibit 1.

Mr. Neblett: We object on the ground no foundation has been laid for it. It hasn't been shown who took it or when it was taken. It may have been taken 10 years ago for all we know.

The Court: The question, Mr. Neblett, was, is this a fair representation of the corner at the time the heroin was picked up, or the package was picked up? I don't know whether it was heroin or not. We haven't got that far along. That is the only question. Is this a fair representation? [56]

Mr. Neblett: The situation at the present time is a photograph has been offered in evidence on behalf of the government. I am objecting on the

(Testimony of Norman Fletcher.)

ground there is no foundation for it irrespective of what the witness has testified to.

The Court: Overruled. It may be received in evidence.

The Clerk: Exhibit 1.

(The exhibit referred to was received in evidence and marked as Government's Exhibit No. 1.)

Mr. Jensen: You may have the witness.

The Court: Cross examine.

Mr. Neblett: If the court please, prior to examining this witness, if I may, I would ask the court's leave to make a motion to strike the testimony of this witness as to the conversations he had with Rayson on the telephone, at which, at each conversation at Mr. Richards' house Mr. Richards or Mr. Farrington were listening in, on the ground that that testimony violates the defendant's rights under Article IV and Article XIV of the Constitution of the United States.

The testimony we move to strike is that there were several conversations between this witness Fletcher and defendant Rayson at a number which he said he had given the defendant Rayson to call him, which number was the narcotics agent's home, Mr. Richards' home. There were several people present at the time the conversation was being held.

The theory upon which we make the motion is that it [57] is not admissible and can't be used to convict the defendant because it is an invasion of his right of privacy.

(Testimony of Norman Fletcher.)

The Court: Mr. Neblett, the testimony was that this witness was listening on the telephone, he had the receiver to his ear close enough for somebody else to hear, and two people heard. There was no tapping of the telephone line. There was no listening in surreptitiously. The two of them were standing there. I have been in a room when you could hear the parties talking over the telephone clear across the room. Does that come within the rule that has been played up so much recently relative to the invasion of personal rights, listening in on a telephone line?

Mr. Neblett: That's right, your Honor. It recently came under consideration in the Supreme Court of California in the Cahan case.

The Court: Well, you can't tap a telephone line, but there was no tapping here, was there?

Mr. Neblett: No, your Honor, there was no tapping.

The Court: Supposing the receiver had been placed on the table and there were four or five people sitting around the table. Is that an invasion——

Mr. Neblett: That is, according to one case we found, an opinion by Judge Learned Hand of the Second Circuit. Frankly, I did not think that was the rule myself until we commenced to look it up. I did not know it was the rule. We [58] didn't know what the evidence of the prosecution was going to be. We knew, of course, there would be tele-

(Testimony of Norman Fletcher.)

phone conversations. In the pretrial memorandum, let's call it, which the government served upon us, these telephone calls were mentioned.

The Court: Let's assume, Mr. Neblett, A and B are carrying on a telephone conversation. If C taps that line somewhere and listens in, of course, it is illegal.

Mr. Neblett: That is true, your Honor.

The Court: But A and B can testify to what the conversation was. Suppose C up here hears the conversation. C might not be able to testify to what he heard, but wouldn't A and B still be able to testify?

Mr. Neblett: That is what this case holds. Judge Hand holds the facts related by your Honor are in effect tapping. It was new law to me. I did not know it.

The Court: Let's see the case.

Mr. Neblett: The case is *United States vs. Polokoff*. It is the Court of Appeals of the Second Circuit, decided June 10, 1940. I forget to get the citation of the case.

The Court: It is 112 Federal Reporter (2d) 888. Let's read this, Mr. Neblett. This was recorded upon a machine annexed to an extension of the same circuit.

Mr. Neblett: That is a recording, if your Honor will read on the following page. I assume there is no more difference [59] in listening than there is in putting a recording machine on and taking

(Testimony of Norman Fletcher.)

it off the machine. There are recording machines now where you can hold a receiver and hear the transmitter on the telephone, and you can pick up sounds we can't hear at all.

The Court: Well, now, Judge Hand says relative to the telephone conversation both must consent to the interception of any part of the talk. There is no interception in this case, is there? Where was the interception?

Mr. Neblett: The interception was by having Richards and Farrington listen in.

The Court: If there had been an extension and they had listened in on the extension, but Judge Hand says that the recording is an interception. I don't see where the interception is here. He held it to his ear and both of them could hear. What was the interception?

Mr. Neblett: I understood that case to hold if they heard it in any way, allowed anyone to hear it who was not an authorized person, who was not authorized by the sender, that that was an interception. I think that is what that case holds. That is the way I interpret it.

The Court: I will deny your motion and will read the case at my leisure and see what I can make out of it. I will have a chance to read it tonight before I go home. I will read it tonight at my leisure and find out. [60]

Mr. Jensen: May I make a statement at this time? I don't want any misapprehension about

(Testimony of Norman Fletcher.)

what occurred in this instance. As a matter of fact, these telephone conversations were in part recorded. That is not presently in evidence.

The Court: I can't rule on something not before the court. The only thing I know is what this witness has testified to, and he testified he held the receiver up to his ear. I am basing my opinion upon his testimony. If it appears later that there was an interception, I am going to reverse my ruling.

Mr. Jensen: In that event, your Honor, I would like you to permit me to make a short argument in respect to it, because I think you will find the Polokoff case, which you have in front of you, was substantially reversed in *Goldman vs. United States*, a Supreme Court decision, in 316 U.S. 129.

The Court: All right.

Mr. Jensen: There are two more recent cases.

The Court: If the Supreme Court has ruled, I don't want to go any further than the Supreme Court. If I can find a Supreme Court decision, the Circuit can't overrule it.

Mr. Jensen: There were only two other cases which are more recent in the Circuit. One says that listening on an extension is permissible and not illegal. I have those citations if the court would care to have them.

The Court: Is it going to be material here? Is there an [61] extension in this case?

Mr. Jensen: No, your Honor.

(Testimony of Norman Fletcher.)

The Court: All right. I will read these two cases. All right, Mr. Neblett, you can cross examine.

Cross Examination

Q. (By Mr. Neblett): Mr. Fletcher, what business or occupation are you in? A. Not any.

The Court: Speak up, please.

The Witness: Not any now.

Q. (By Mr. Neblett): How old are you, Mr. Fletcher? A. 35.

Q. How long have you lived in Los Angeles?

A. Since 1949.

Q. Did I understand you to say this morning that you had been convicted of a felony in Louisiana? A. I did.

Q. In the federal court? A. Yes.

Q. That was under the Harrison Narcotics Act?

A. Yes.

Q. Did you serve a term in the penitentiary?

A. I did. [62]

Q. Weren't you convicted of another felony in Louisiana at a subsequent date to the first one you testified to, say in May 1942, of receiving stolen property? A. I was.

Q. That was in the state court of Louisiana, wasn't it?

A. I was granted a full pardon and citizenship restored.

Q. Did you serve a term in the penitentiary for that?

(Testimony of Norman Fletcher.)

A. I did serve a part of a term and was granted a pardon and full citizenship restored.

Q. You were convicted of a felony in Los Angeles and sentence was rendered against you March 20, 1950, isn't that right? A. That's right.

Q. That was for violation of Section 1150 of the Health and Safety Code, possession of narcotics?

A. It was.

Q. Were you convicted of a felony?

A. Yes, sir.

Q. Did you serve a term for that?

A. I did.

Q. How long? A. Three years.

Q. Where were you in prison?

A. Folsom. [63]

The Court: When did you get out?

The Witness: 1953.

Q. (By Mr. Neblett): Do you remember the date you got out in 1953? A. April 6.

Q. When? A. April 6.

Q. 1953. Were you let out on parole?

A. I was.

Q. Do you know what year your parole expires?

Mr. Jensen: I am going to object to this, your Honor. I don't think beyond the fact of conviction of a felony, that it has any materiality.

The Court: What is the purpose?

Mr. Neblett: Your Honor, I will withdraw that. I think the objection is well taken. I will withdraw it.

(Testimony of Norman Fletcher.)

Q. How long have you known the defendant Rayson? A. Since 1953.

Q. Do you remember the circumstances under which you met him?

A. I can recall meeting him in 1953, but at a later date—from seeing him, just seeing him around, and at a later date I was introduced to him.

Q. Was he introduced to you by your wife?

A. I don't recall. [64]

Q. How long have you known the defendant Kelley? A. 1953.

Q. What were the circumstances under which you met the defendant Kelley?

A. Under a narcotics transaction.

Q. When was that? A. In 1953.

Q. Do you remember the time in 1953?

A. It was the latter part of the year. I just can't recall when it was. It was the latter part of the year.

Q. Were you dealing in narcotics in 1953?

A. I was.

The Court: In other words, you were out of Folsom in 1953 and you immediately started the narcotics business?

The Witness: Yes, sir.

Q. (By Mr. Neblett): You testified this morning that you went to see Kelley some time in August 1953, isn't that so? I mean 1955.

A. I did.

Q. Do you remember the date?

(Testimony of Norman Fletcher.)

A. On the 22nd of August.

Q. What?

A. I think it was the 22nd of August.

Q. How did you happen to go down to see him? Did he call you or did you call him or did you make an appointment [65] of any sort?

A. I went down and seen him in his place of business.

Q. What was the purpose of your going there?

A. To obtain some narcotics.

The Court: Just a minute. May I ask a question?

Mr. Neblett: Yes, your Honor.

The Court: You say your purpose was to go down to obtain narcotics. For the use of the government or for your own use?

The Witness: For the use of the government.

The Court: All right.

Q. (By Mr. Neblett): Were you sent there by anyone? A. I was.

Q. Who sent you? A. The officers.

Q. Which officers?

A. Well, it was the crew of them.

Q. Don't you know any of them?

A. I know them by name.

Q. Well, who were the ones?

A. Agent Richards, Sergeant Landry, Deputy Farrington, and Deputy Stoups.

Q. How did this question come up about your going to see Kelley?

A. I had had previous dealings with Mr. Kelley.

(Testimony of Norman Fletcher.)

Q. Go ahead. How did it come up with the officers? The officers instructed you to go to see Kelley, is that right? A. Yes.

Q. How did that come up between you and the officers? Did you tell the officers something, or did the officers tell you something, or what?

A. I promised to cooperate with the officers.

The Court: May I break in and ask a question?

Mr. Neblett: Any time you like, just go right ahead. I will suspend.

The Court: You say you met Kelley in 1953?

The Witness: That's right.

The Court: Then you say you went to see him in 1955. Now, between 1953 and 1955, had you had any other transactions with Kelley? Had you kept up with him?

The Witness: Yes, your Honor.

The Court: You knew him all this period, did you?

The Witness: I knew him, your Honor.

The Court: All right.

Q. (By Mr. Neblett): What was said by the officers and by you at the time that they told you to go to see Kelley in 1955?

Mr. Jensen: I am going to object to this, your Honor. We have no time, no people present, or anything else with respect to any conversation he is asking now. I don't think we can go at it in that fashion. It is too broad and too nebulous.

The Court: Read the question.

(Question read.)

(Testimony of Norman Fletcher.)

The Court: Maybe you better lay a foundation.

Q. (By Mr. Neblett): Where did this conversation take place between you and the officers in which you discussed Kelley?

A. Agent Richards' house.

Q. Where?

A. Agent Richards' house.

The Court: You certainly can talk up better than that. You ought to be able to make a man hear across the room.

The Witness: Agent Richards' house.

Q. (By Mr. Neblett): What were you doing at Mr. Richards' house?

A. Well, I went by there. I was cooperating with the officers.

Q. How did you come to cooperate with the government? What arrangement or agreement did you have with the government to cooperate?

A. I was arrested by the federal agent.

Q. When? A. In February. [68]

Q. Of what year? A. 1955.

Q. Arrested for what? A. Narcotics.

Q. Were you indicted or an information filed against you in the federal court?

A. I don't know.

Q. Were you brought before a commissioner and your bond fixed, or anything of that sort?

A. I was.

Q. Have you ever been brought on for trial on that? A. I haven't.

Q. You were arrested in February of 1955 upon

(Testimony of Norman Fletcher.)

a narcotics charge. Was it possession, sale, or what?

A. Possession.

Q. You showed up at Mr. Richards' office on a certain date. Do you remember when that was?

A. I showed up in Mr. Richards' house on numerous occasions.

Q. When was it?

A. I just showed up there on numerous occasions.

Q. What was the first one you were there?

A. I couldn't just recall the first one.

Q. Did Mr. Richards ask you to come?

A. Yes. [69]

Q. You are employed by the federal government as an undercover agent, aren't you?

A. Since October.

Q. Of what year? A. This year.

Q. October this year? A. October.

Q. Weren't you employed by the government as an agent on August 22, 1955?

A. I was cooperating with the officers.

Q. What do you mean by cooperating? I don't quite understand what you mean by cooperating. You cooperated to the extent that they gave you \$860, is that right? A. That's right.

The Court: Just a minute, Mr. Neblett. Let me understand this. There must have been some sort of understanding or a deal made between you and the officers of the government. What was it?

The Witness: It wasn't any deal. At the time of my arrest?

(Testimony of Norman Fletcher.)

The Court: You were arrested. You were picked up?

The Witness: Yes, sir.

The Court: You were brought in before a commissioner?

The Witness: I was.

The Court: What happened? You weren't prosecuted? [70]

The Witness: No. I promised to cooperate with the officers in apprehending the bigger peddlers, narcotics peddlers.

The Court: Did they promise not to prosecute?

The Witness: No, they did not. They pointed out that it would be pointed out to the prosecuting attorney and the judge.

The Court: All right.

Q. (By Mr. Neblett): You say you went to Mr. Richards' house numerous times after your arrest in February 1954, and prior to the time that you saw Kelley on August 22, 1955.

A. That's right.

Mr. Jensen: I object to that. I think counsel inadvertently made a mistake in his date. He said February 1954.

Mr. Neblett: I should have said 1955. I accept the correction. February 1955 and August 22 of the same year.

Q. Do you understand the question now? You went there on numerous occasions.

A. I went there.

(Testimony of Norman Fletcher.)

Q. Do you know on how many occasions you went to Mr. Richards' house?

A. No, because I was cooperating with them. I would see them practically every day, I would be with them.

Q. Tell us a little more about what you mean by cooperating? What are you supposed to do to cooperate? That covers a lot of things. I don't quite understand you.

A. I stated to help apprehend bigger narcotics.

Q. To help do what?

A. To help apprehend bigger narcotic peddlers.

Q. What were you supposed to do to help?

A. Give the information or make a buy from the individual in their presence.

Q. At these numerous meetings with Mr. Richards at his house—that is the same house you testified to where the telephone call was received this morning, is that right?

A. That's right.

Q. At those conversations who was present besides Mr. Richards? Let's take the first one.

A. Deputy Farrington.

Q. Anyone else?

A. I don't recall, because we had had a meeting before that and all of the officers was together.

Q. Where was this meeting held prior to the one you had at Mr. Richards' house?

A. It was at Mr. Richards' house about 7:30 that morning.

Q. You said you had had a meeting before that. Was that in Mr. Richards' house, too?

(Testimony of Norman Fletcher.)

A. At that time.

Q. That same day?

A. There was more officers at that time.

Q. How did you get down to Mr. Richards' house? Did [72] someone ask you?

A. It was a pre-arrangement from the day before when I went down to see Mr. Kelley.

Q. What was the pre-arrangement made the day before?

A. Mr. Kelley told me that he would have Rayson call me.

Q. No, no. I am talking now about the arrangement you had with the government and the officers to look for narcotic offenders, or whatever you were supposed to do. I am not talking about the conversation of August 22. You said you went to Mr. Richards' house many times after February 1954.

A. Yes.

Q. After you were picked up on a narcotics charge, possession.

A. That's right.

Q. When was the first of those times that you went to Mr. Richards' house after February 1954?

A. I couldn't recall.

Mr. Jensen: I object again. I think we are still having trouble with the date. The record shows he says 1955.

Mr. Neblett: 1955. I am sorry, Mr. Jensen. I apologize. 1955.

Q. Do you remember the first date you went after February 1955?

A. No, I don't. [73]

(Testimony of Norman Fletcher.)

Q. Approximately when?

A. Oh, maybe a week, two weeks after.

Q. How did you happen to go down there? Who asked you to come?

A. As I stated before, I was with the officers, cooperating with the officers.

Q. I know, but somebody must have said something to you, to meet him at Mr. Richards' house. Did someone do that, or did you just come down there because you knew where Mr. Richards lived?

A. As I stated, I was cooperating with the officers.

Q. Will you answer the question? Who asked you to go to Mr. Richards' house? Leave out the word cooperate.

A. Mr. Richards.

Q. What?

A. Mr. Richards.

Q. What did he say?

A. He told me to meet him over at his house.

Q. Did he tell you what he wanted you to come for?

A. No. I knew what he wanted me to come for, because I was with them all the time. I am telling you I was with them practically every day since the arrest.

The Court: Let's go back. You were arrested and you were brought in before the United States Commissioner. Were you placed under bond? Just answer that yes or no. [74]

The Witness: No, I was not.

The Court: How were you released? On your own recognizance?

(Testimony of Norman Fletcher.)

The Witness: On my own recognizance.

The Court: Then you immediately started to cooperate, is that right?

The Witness: That's right.

Q. (By Mr. Neblett): What were you to get for cooperating?

A. I was not promised anything.

Q. When did the name of Kelley first come into the conversation between you and the officers?

A. I can't recall.

Q. Did the name of Kelley come up before you went to see Kelley on August 22, 1955?

A. It was.

Q. How did it come up and where?

A. From me.

Q. Where? Where was it?

A. With Mr. Richards. I don't know if it was in his house or in his car riding in it, or what.

Q. What did you say about Kelley?

A. To the officers I stated I had previous dealings with Mr. Kelley and Rayson.

The Court: Had previous dealings with Kelley and what? [75]

The Witness: And Rayson.

Q. (By Mr. Neblett): At that time, did you make arrangements with the officers or was something said about trying to buy some narcotics from Kelley and Rayson in order that they might be caught? Was something said about that?

A. May I ask the question again, please?

(Testimony of Norman Fletcher.)

Q. Was something said at the time Kelley's name came up? Who was present at that time?

A. The whole crew, Richards, Sergeant Landry and Deputy Stoups.

Q. That was the first time you had ever brought Kelley's name up, before these gentlemen I am talking about? A. It was.

Q. Was that the first time you had ever heard Kelley's name mentioned in their presence?

A. It was.

Q. What did you say? You brought the name up. Just what did you say to this whole crew that you referred to a while ago?

A. I told them I could, that I had previously, I explained I had previously dealt with Mr. Kelley and Rayson, and that I could again.

Q. And you could buy from him again?

A. I could buy from him again.

Q. What was said? What was done for you to make a purchase? Was anything said about how you would go about making the purchase?

A. I don't recall.

Q. You got some instructions from the officers, didn't you? A. I did.

Q. What were those instructions?

A. I went—after I told them that I could buy some—make the purchase, they instructed me to go in, and I went on and talked to Mr. Kelley.

Q. Was this conversation held at Mr. Richards' house? A. It was.

Q. That was the first time Kelley's name ever

(Testimony of Norman Fletcher.)

came into the conversation between you and these officers, was it? A. No, it was not.

Q. When was the first time?

A. I can't recall, because I was giving them information all along.

Q. Had you been talking to them about Kelley right along?

A. Yes, I had been talking to them.

Q. Now, on this time, on August 22 or just prior to August 22, that you were with all of the officers that you have mentioned, the officers gave you some instructions, did they not, as to how to approach Kelley? [77]

A. No, no instructions. They did not give me any instructions.

Q. Something must have been said. You wound up at Kelley's La Jolla Cleaning Shop, didn't you?

A. That's right.

Q. Did you just go over there by telepathy? How did you happen to get over there?

A. I drove over there.

Q. I know, but did you have any pre-arranged plan or statements or anything from these officers before you left? A. Yes, we did.

Q. The officers followed you over there.

A. That's right.

Q. What did you say before you went over there? What did Mr. Richards, Mr. Farrington, and the other officers say to you, or any of them?

A. When I first brought up that I could make this purchase from Mr. Kelley and Rayson, I think

(Testimony of Norman Fletcher.)

it was called to the attention of the head of the narcotics supervisor.

Q. Who was that? Mr. Davis?

A. Mr. Davis.

Q. And then what?

A. And the permission was given for me to make the transaction, to make the deal.

Q. Who? [78]

A. Permission was given for me to make the buy.

Q. I know. Something must have been said, though. They don't just make a provision for you to buy. Let me ask you this question. Didn't you say to the officers, "I can catch Kelley with narcotics if you give me some money"? Did you say something like that? A. No, I didn't.

Q. How did you happen to bring up the question of money then?

A. That is the only way I could obtain it, was by some money, some narcotic funds.

Q. Did you expect Kelley to give it to you?

A. No, I didn't.

Q. What kind of plan did you make for the money? A. With the officers.

Q. What did the officers say when you asked for some money?

A. They just gave me the money and told me that they had received permission from San Francisco for me to make the purchase.

Q. Then you didn't have any conversation, as I

(Testimony of Norman Fletcher.)

understand it. They just handed you \$700 and you walked up to Kelley's shop, is that right?

A. I wasn't given the money when I went to Mr. Kelley's.

Q. I would like for you to tell me, if you could, just [79] what conversation you had with the officers and the officers had with you, Mr. Fletcher, just prior to the time that you went to see Kelley on August 22.

A. I can't recall the conversation.

Q. You went to see Kelley on August 22, did you not?

A. I did.

Q. At his cleaning shop on East Sixth Street called the La Jolla.

A. That's right.

Q. Do you remember the address of the shop?

A. No, I don't.

Q. Had you ever been there before?

A. I had.

Q. You were followed by the officers. You drove up there from Mr. Richards' house, did you?

A. Yes, sir.

Q. Where is Mr. Richards' house?

A. On 56th Street.

Q. 56th and what?

A. It is in the 1300s. I don't know exactly. It is in the 1300 block west 56th Street.

Q. You made arrangements with the officers to follow you when you went to Kelley's place?

A. Yes.

Q. What did you say in making the arrangements? Did [80] you say, "You follow me now and

(Testimony of Norman Fletcher.)

I will go on up to Kelley's place, go in there and make the arrangements for the stuff, and then I will come out"? Was there something of that sort? Did you say something of that sort?

A. No, sir, I did not.

Q. What did you say?

A. I was going over to talk to Mr. Kelley about some narcotics.

Q. Did you tell the officers that? A. Yes.

Q. You told them you were going to talk to Mr. Kelley about the stuff. Then what did the officers say? Did they just keep mum, or did they say something? A. No.

Q. What? A. They didn't keep mum.

Q. What did they say?

A. "All right." Permission was given.

Q. Did you ask them to follow you, or did they say they were going to follow you?

A. They said they were going to follow me.

Q. How many? Five?

A. I think there was two cars—there was three in two cars.

Q. You were driving what sort of a car? [81]

A. '55 Mercury.

The Court: Is that your car?

The Witness: Yes, sir.

The Court: And you haven't had any job, you said a little while ago, you didn't do anything?

The Witness: That was before I got apprehended for narcotics.

(Testimony of Norman Fletcher.)

The Court: Did you make enough money working for the government to buy a Mercury?

The Witness: I had this car.

The Court: You what?

The Witness: I had this car, and that was right after I was apprehended for selling narcotics.

The Court: You got out of prison in 1953. When did you buy the car?

The Witness: In 1955.

The Court: You said you didn't have a job, didn't do anything.

The Witness: The car I was driving was not mine, the 1955. The car I had was seized by the federal government.

The Court: This 1955 car, then, was not yours?

The Witness: It was not.

The Court: To whom did it belong?

The Witness: My girl friend.

Q. (By Mr. Neblett): You are married, aren't you? [82]

A. No, I am not.

Q. You have been married, haven't you?

A. No, I haven't.

Q. Did you pay for this car that your girl friend has?

A. No. I guess she paid for it. It was her car.

Q. Is it registered in her name? A. It is.

Q. Do you drive it all the time?

A. No, I don't.

Q. How much do you use it?

A. At that time I was using it only every day,

(Testimony of Norman Fletcher.)

or whenever I wanted it, because she was working.

Q. Where is the car now?

Mr. Jensen: I am going to object to this, your Honor, as being incompetent, irrelevant and immaterial.

The Court: I don't know. It might go to the credibility of the witness, because he has testified he drove down in his car. You know, we have got a witness here who evidently is the government's main witness, and probably the question is going to be the credibility of the witness.

Mr. Jensen: No question about that, your Honor. I don't mind any question that goes to the credibility, but we have explored the business of the car quite a bit now.

The Court: Overruled.

Mr. Neblett: Read the question, please. [83]

(Question read.)

The Witness: I think she have it now. At that time I was staying with her. Now I don't stay with her.

Q. (By Mr. Neblett): You are not staying with her any more? A. No, I am not.

Q. Has she taken the car back from you?

A. She did.

Q. How long ago?

Mr. Jensen: I am going to renew my objection, your Honor. I think we are getting pretty far afield.

The Court: I think I will sustain the objection now. He has lost the car now, or the girl friend.

(Testimony of Norman Fletcher.)

Mr. Neblett: Very well, your Honor.

Q. On August 22, you left Mr. Richards' house in what you said was your car, and what color Mercury was it? A. White Mercury.

Q. 1955 model? A. Yes.

Q. And these officers drove behind you in two cars, is that right? A. That's right.

Q. How far were they behind you?

A. Right behind me. I was driving—I was driving so that they would stay behind me. [84]

Q. When you pulled up in front of the La Jolla cleaning establishment—and that is run by Mr. Kelley, isn't it? A. Yes.

Q. You know he runs a pressing and cleaning shop, do you not? A. Yes.

Q. You also know he runs a cafe in that neighborhood, too, do you?

A. No, I don't know that.

Q. Haven't you been in the cafe numerous times? A. I have.

Q. Haven't you seen Kelley in there?

A. I have.

Q. You have seen him in there numerous times, haven't you? A. Yes.

Q. It was in the cafe where you first saw him, isn't it? A. It is.

Q. You said you had narcotics transactions with Kelley going back to 1953, shortly after you were out of Folsom Penitentiary. How did that come about that you had transactions with him in 1953? Can you tell us the circumstances?

(Testimony of Norman Fletcher.)

A. I can.

Q. What are they? [85]

A. I was introduced to Mr. Kelley by a lady that was working at the La Jolla, I think it is the La Jolla Cafe.

Q. Was that a friend of yours?

A. It was.

Q. Is that the girl friend you were talking about? A. No, it is not.

Q. Had you known her for some time?

A. We were all living at the same house together.

Q. When? A. In 1953.

Q. Going back to the La Jolla cleaning shop now, you pulled up, and where did you park?

A. Just about the La Jolla Cleaners.

Q. On the same side of the street?

A. Yes.

Q. You hadn't given Kelley any notice that you were coming or anything? A. I had not.

Q. You knew where the La Jolla cleaning shop was and you knew the telephone number, because you could look it up in the book? You knew it was in the book, didn't you?

A. I never did call the La Jolla Cleaners.

Q. Never called him on the telephone at all at any time? A. I never have. [86]

Q. But you knew the name of the cleaning shop, La Jolla, you knew that was the name of it?

A. I had met Mr. Kelley before.

(Testimony of Norman Fletcher.)

Q. I say you knew that was the name, didn't you? A. Yes.

Q. Where did the officers park, if you know, or did they park?

A. At Towne and Sixth Street.

Q. At what? A. Sixth and Towne.

Q. Where is that with respect to the La Jolla?

A. Approximately a block.

Q. How much? A. One block.

Q. Could you see them up there?

A. I could.

Q. Did you take a look at them when you got out and went in the cleaning shop? A. Yes.

Q. To your knowledge, did they ever come any closer than one block to the La Jolla cleaning shop while you were in there? A. Yes.

Q. You walked in the cleaning shop. You said you hadn't informed Kelley you were coming. [87]

A. No, I did not.

Q. What did you say to him?

A. We exchanged greetings, and he told me he hadn't seen me in quite a while.

Q. He hadn't seen you in quite a while. How long was that? How long is quite a while?

A. Oh, about the first part of 1954.

Q. You hadn't seen him since the first part of 1954? A. That's right.

Q. That would be a little over a year——

A. I hadn't seen him to talk to. I had seen him from a distance. I passed him but I hadn't seen him to talk to.

(Testimony of Norman Fletcher.)

Q. You exchanged greetings, "Good morning, how do you do"? A. Yes, sir.

Q. Did you sit down? A. No, sir.

Q. Was Kelley sitting or standing?

A. He was sitting.

Q. He was sitting?

A. He was sitting down back of the counter.

Q. At a counter.

A. Back of the counter by the telephone.

Q. What did you say then to Kelley after you exchanged greetings? [88]

A. I told him I wanted to make a purchase, start purchasing some more stuff from him.

The Court: Was that the first thing you said?

The Witness: No, it wasn't. After we exchanged greetings, he told me he hadn't seen me around in quite a while, and I told him I hadn't been around.

The Court: Did he ask you what you were doing?

The Witness: He didn't.

The Court: So after you exchanged greetings, you began the conversation by saying you wanted to buy some stuff?

The Witness: I did.

Mr. Neblett: Excuse me, your Honor. May I confer with my associate?

The Court: It is time to take our afternoon recess. You know the one that works the hardest around here is the reporter. He has to keep busy all the time. He needs a little rest. We will now recess until 10 minutes after 3:00.

(Testimony of Norman Fletcher.)

(Recess.)

Q. (By Mr. Neblett): When we left off you were just saying that you had passed the time of day with Kelley. You hadn't seen him since about February 1954, and now it is August 22, 1955, we are discussing. Did I understand you to say in answer to the court's question that you were the one who brought up the question of stuff with Kelley?

A. I was. [89]

Q. Just what did you say?

Mr. Jensen: I am a little lost, your Honor. May we have the time of this conversation?

Mr. Neblett: August 22, 1955.

The Court: The first time he went down there.

Mr. Jensen: All right.

Q. (By Mr. Neblett): Just what did you say to Kelley after you passed the time of day and you brought up the question of stuff, what did you say about stuff?

A. I told him I wanted to make a purchase, and he replied that there wasn't anything in commission at that time for about a week, that if I had been around about a week——

Q. Now, I am not asking you what he said. I am asking you what you said. You said you wanted to make a purchase of stuff, is that right?

A. I did.

Q. Did you tell him when you wanted to purchase it? A. Yes, I did.

Q. When did you tell him you wanted to purchase it, at what time?

(Testimony of Norman Fletcher.)

A. There wasn't any exact time set, because we had a conversation in between.

The Court: Was there any discussion as to price? Did you just go in and say, "I want to buy stuff"? Did you ask what the price was, anything like that?

The Witness: No, there wasn't any discussion of any price.

Q. (By Mr. Neblett): Did Kelley say to you that he was not in the business and didn't want to have anything to do with you or stuff either, didn't he say that to you? A. He did not.

The Court: May I inquire? You go into this establishment. Was there anybody else there besides Kelley?

The Witness: Nobody else.

The Court: Just the two of you?

The Witness: Just the two of us.

Q. (By Mr. Neblett): You left after a while. Where did you meet the officers after you left, if you did meet them?

A. In Mr. Richards' house.

Q. You joined them back there? A. I did.

Q. Were they still parked up on the street when you left, or did you see them?

A. Deputy Farrington got out of the car, and also Agent Richards got out of the car and passed the shop while I was talking to Mr. Kelley.

The Court: You mean they were walking?

The Witness: They were.

Q. (By Mr. Neblett): What is the situation

(Testimony of Norman Fletcher.)

there? Are there open windows in the La Jolla cleaning shop? [91] A. It is.

Q. I mean big windows? A. It is.

Q. So you can see out? A. Yes.

Q. Is it a one-room establishment?

A. It is.

Q. It has a desk up in front? A. Yes.

Q. Did you see them go by, Farrington and Richards? A. I did.

Q. Did you notice whether they looked in or not? A. I did.

Q. Did they look in? A. They did.

Q. Did they hesitate or stop in front of the cleaning shop? A. No, they did not.

Q. And you didn't see them again until you got back to Mr. Richards' house?

A. That's right.

Q. So when you went back, you told them Kelley had said to you he couldn't furnish it at that time? Did you tell them that? A. I did. [92]

Q. And you told them that no mention was made of price or anything? A. I did.

Q. Did you tell them you were going to see Rayson then? A. No, I did not.

Q. What did you tell them about Rayson at that time?

A. Well, prior to me leaving the La Jolla Cleaners, I had a conversation with Mr. Kelley.

Q. I know that.

A. I never did give you the conversation. I never did tell you the conversation, the conversation I had.

(Testimony of Norman Fletcher.)

Q. You never did what?

A. You never did ask me the conversation I had, because that is where Rayson's name was brought in.

Q. I know that. I haven't forgotten anything. What did the officers promise to give you if you could get Kelley to sell you, or tell you where you could buy some narcotics?

A. They did not promise me anything.

Q. You just did that for the service of the government, is that right? A. Yes.

Q. When was the next time that you saw Kelley?

A. On the 13th of September.

Q. 13th of September. What was the occasion of your going there that time? Did you have a conversation with the [93] officers prior to your going to Kelley on the 13th? A. I had.

Q. What did you tell the officers as the reason for your going back the second time?

Mr. Jensen: I am going to object to that, your Honor. If we are going to have the conversation, we better have it all, not piecemeal.

Mr. Neblett: I think I can ask on cross examination leading questions, can't I, your Honor.

The Court: Overruled.

Q. (By Mr. Neblett): What reason did you state to the officers on September 13th why you were going back to see Kelley again?

Mr. Jensen: I will object to that as calling for a conclusion. There is no evidence at this time that he wanted to go back to see them again.

(Testimony of Norman Fletcher.)

The Court: Hasn't he testified he went back to the La Jolla Cleaners on the 13th?

Mr. Jensen: Yes, he has, your Honor.

The Court: Objection overruled. Read the question.

(Question read.)

The Witness: It was a conversation from the first meeting of Mr. Kelley that caused me to go back that hasn't been brought out, that you didn't ask me the conversation. Then I could explain it and tell you what was the reason. [94]

Q. (By Mr. Neblett): You didn't say anything to the officers then about going back a second time, did you?

A. Well, on the first occasion I had made arrangements.

Q. I am not asking you that. You certainly can remember this if your memory is—well, I withdraw that part of it. I won't argue with the witness. Excuse me, your Honor. I will ask it this way.

From what location did you leave to go to Kelley's cleaning shop on September 13, 1955?

A. From Mr. Richards' house.

Q. Mr. Richards' house. How long were you at Mr. Richards' house that morning?

A. Oh, maybe about an hour before.

Q. An hour. Did you have any conversation with Mr. Richards that morning?

A. Yes, we did.

Q. Was anyone else present besides Mr. Richards and yourself?

A. Yes.

Q. Who?

(Testimony of Norman Fletcher.)

A. Deputy Farrington, Sergeant Landry, and Deputy Stoups.

Q. What was said about your going back to Kelley that morning, or on that day, I won't say morning? [95]

A. I went back to tell him that I hadn't received the telephone call from Rayson.

Q. I know, but what did you say to the officers at Mr. Richards' house and what did they say to you about your going back to see Kelley? Did you just take off and drive over to Kelley's and didn't tell anybody about it?

A. No, I did not.

Q. Did the officers follow you the second time?

A. They did.

Q. What did you say about it? You said something, didn't you?

A. Yes, that I was going probably to make a purchase of the narcotics.

Q. You were going to see Mr. Kelley to make a purchase of narcotics?

A. Yes.

Q. Did you use the word "Kelley" or "Going to see Kelley"?

A. I did.

Q. Or did you use the words "old man"?

A. I used the word "Kelley" to the officers.

Q. What did you say to the officers as to an arrangement, if any, you had to purchase the narcotics from Kelley on September 13th? Did you tell them anything about what arrangement you had, if any? [96]

A. I beg your pardon? I didn't understand that.

Q. Did you tell the officers at Mr. Richards'

(Testimony of Norman Fletcher.)

house on September 13, 1955, that you had some sort of an arrangement to purchase narcotics from Kelley on that day? A. No, I didn't.

Q. What did you say about purchasing the narcotics?

A. Since I was working on the case before that, it hasn't been brought out that Mr. Kelley told me that he was going to have—did Rayson know how to get in touch with me, and I told him yes, and I never did get in touch with Rayson, and that was my reason for going back to Mr. Kelley.

Q. Did you tell the officers that?

A. I did.

Q. You hadn't heard from Kelley at all between August 22 and September 13 when you went back, had you? A. No.

Q. You had no communication with him whatever, is that right? A. I hadn't.

Q. So you went back on September 13 and asked Kelley what the trouble was, is that right?

A. Yes.

Q. Did you tell the officers you were going to do that? A. I did.

Q. You were going back to find out what the trouble was? [97] A. I did.

Q. Did Kelley at any time prior to September 13th give you a telephone number where Rayson could be reached? A. No, he never.

Q. He did not? A. No.

Q. Did you give Kelley a number where Rayson could reach you?

(Testimony of Norman Fletcher.)

A. On the second occasion, I did.

Q. I said, did you give him that number?

A. I did.

Q. What number did you give him?

A. Pleasant 1-1648.

Q. That is Mr. Richards' home number, is it?

A. That's right.

Q. So you never heard from Rayson at all, did you, between August 22 and September 13?

A. I didn't.

Q. Nor Kelley? A. No.

Q. You went back then to see if you couldn't buy from or get from Kelley or get Kelley to set it up for you, is that what you went back for?

A. Yes.

Q. Then you were trying to get Kelley to set up a sale [98] for you, were you not, or a buy from him, or get him to set up a sale, is that what you were trying to do?

A. All my contacts, I made them through Mr. Kelley, and he arranged it for someone to call——

Q. Then you went to Kelley and asked him to arrange it? A. That's right.

Q. Without some prompting from Kelley. You never heard from Kelley until you first went there? He didn't ask you to come or say anything about it, is that right? A. That's right.

Q. You went back on the second time. Did you see Kelley? A. I did.

Q. Did the officers follow you the second time?

A. Yes, sir.

Q. Where did they stop the second time?

(Testimony of Norman Fletcher.)

A. On the second occasion, Deputy Farrington drove in front of me and Sergeant Landry and Agent Richards were behind the car I was driving.

Q. Where did this officer who was in front of you park, or did you see him park?

A. I did.

Q. Where did he park?

A. He parked in front of me in the next block, which would be between Gladys and Ceres. [99]

Q. At least a block away, was he?

A. A very short block.

Q. I mean was it a couple of hundred feet away or more?

A. It was.

Q. Where did the officers park?

A. On Sixth Street and Towne.

Q. How far away?

A. About the same distance that they had parked before.

Q. Two or three hundred feet away?

A. Yes.

Q. In the rear?

A. Yes.

Q. Did any of them come out and come down and stand near you when you were talking to Kelley?

A. No. I was on the inside talking to Kelley, and had observed the officers.

Q. I thought you said this morning you saw him on the street and did not go inside for the second conversation, is that right?

Mr. Jensen: I object to that. That is not the record.

(Testimony of Norman Fletcher.)

Mr. Neblett: He can say whether or not it was.

The Court: Overruled.

The Witness: No, it was the third time I went down to see him he was on the sidewalk.

Q. (By Mr. Neblett): Tell us what happened the second [100] time you went. I am sorry if I made a mistake. I did not intend to make one if I could help it.

A. I told Mr. Kelley——

Q. You went in the cleaning shop again?

A. I did.

Q. And was Kelley sitting at the same place behind the desk? A. He was standing.

Q. This time he was standing up?

A. Yes, he was.

Q. What did you say to Kelley this time?

The Court: Just a minute. Was there anybody else present besides you and Kelley?

The Witness: There wasn't anybody else.

The Court: Just the two of you?

The Witness: Just the two of us.

Q. (By Mr. Neblett): The officers were two or three hundred feet away, weren't they, both cars of them? A. They were.

Q. When you went in? A. They were.

Q. No officer was ever present when you and Kelley were talking on any of these occasions, is that right? A. That's right.

Q. And no one else was present? [101]

A. No one else.

Q. You walked in that morning and you said,

(Testimony of Norman Fletcher.)

“Good morning, Kelley,” or something to that effect?

A. He was on the telephone. He was talking on the telephone when I walked in.

Q. When he got off the telephone, what did you say?

A. After I spoke to him, I told him that Rayson hadn't got in touch with me, and he told me that——

Q. Wait a minute. I want to know what you said. What did you say?

A. I told him that Rayson hadn't got in touch with me.

Q. Didn't you ask him to get hold of Rayson and have him get in touch with you?

A. I don't recall that.

Q. What did you say about Rayson getting in touch with you? Did you only say he had not called or got in touch with you, is that what you said?

A. No, that wasn't all.

Q. What else did you say?

A. I told him he had never contacted me, and then Mr. Kelley interrupted me and told me that Rayson had told him that he had seen me——

Q. I didn't ask you that. I move to strike that out as not responsive.

The Court: It may go out. [102]

Q. (By Mr. Neblett): I asked you only for what you said. Have you told us all that you said at this conversation with Mr. Kelley?

A. No, I haven't told you all.

(Testimony of Norman Fletcher.)

Q. What else did you say? I don't want anything he said. I want to know what you said.

Mr. Jensen: Your Honor, I am going to object to this. It is manifestly unfair to request the witness to give just one side of a conversation.

The Court: I am sorry, but this is cross examination. He can ask for part of the conversation on cross examination. He is asking what this witness said, and if he can remember, he should testify.

Mr. Jensen: Without respect to any of the replies that were made?

The Court: Objection overruled.

Q. (By Mr. Neblett): Tell us all that you said to Mr. Kelley at the meeting at his cleaning shop on September 13, 1955.

A. I told him that I was still interested in the deal, and I gave him a number for him to have someone to contact me.

The Court: Just a minute. You gave him a number to have someone contact you. Did you give him a number to have Kelley contact you?

The Witness: I gave the number to Mr. Kelley.

The Court: For Mr. Kelley to contact you or somebody else to contact you?

The Witness: Your Honor, in pre-arrangement he had always taken the number and had someone else to contact me.

The Court: All right.

Q. (By Mr. Neblett): Is that all that you said at this meeting to Mr. Kelley?

A. That's all I recall.

(Testimony of Norman Fletcher.)

Q. All you recall at this time. When you left the cleaning shop on that day, did you return to Mr. Richards' house? A. I did.

Q. Was this in the morning or evening or afternoon? I have forgotten. Would you say this conversation was in the morning or afternoon on September 13? A. It was in the morning.

Q. In the morning? A. Around noon.

Q. Around noon. You know the defendant Eugene Rayson, don't you? A. I do.

Q. When was the first time you met him?

A. 1953.

Q. You said he was introduced to you by some woman? A. No, I didn't. [104]

Q. What did you say about that? I have forgotten.

A. He called me and told me that Mr. Kelley had given him a number to call.

The Court: In 1953, we are talking about?

The Witness: Judge, your Honor, he asked me the question, when did I ever meet Rayson.

The Court: And you said you first met him in 1953.

The Witness: Yes.

The Court: All right. That is what we are trying to find out. How did you meet him in 1953?

The Witness: On one transaction that I had with him through Mr. Kelley.

Q. (By Mr. Neblett): Do you recall who introduced you to Rayson?

A. No, I can't recall.

(Testimony of Norman Fletcher.)

Q. Do you know where you met him?

A. I had seen him around numerous times, just passed by him.

Q. You didn't get out of the penitentiary until what month in 1953? A. April.

Q. You had seen him around after April 1953, had you not? A. I had.

Q. After you met Rayson the first time, did you see him [105] very often? A. I did.

Q. Where did you see him? Just generally now. I know you can't pin it all down.

A. Fifth and Stanford. He was running a game, a gambling game there.

Q. A what? A. Fifth and Stanford.

Q. Fifth and Stanford. What location is that in the city? I don't know where that is.

A. The next block from the La Jolla Cleaners, exactly one block.

Q. Fifth and Stanford?

A. Fifth and Stanford.

Q. What is that? Is there a cafe there?

A. There are numerous places there, cafes, pool halls, hotels.

Q. Well, it doesn't matter. You saw him around there? A. I did.

Q. When were you contacted by Rayson, or Rayson contacted by you after September 13th? You saw Kelley on September 13th. When did you next hear from Rayson after September 15, 1955?

A. The next morning.

Q. September 14? [106]

(Testimony of Norman Fletcher.)

A. That's right, yes, sir.

Q. Where did he call you?

A. At Agent Richards' house.

Q. At Agent Richards' number? You had given that number to Rayson at some time?

A. No, I didn't.

Q. To whom did you give the number?

A. Mr. Kelley.

Q. When did you give him the number?

A. On the 13th.

Q. Rayson called you in the morning, you say, of the 14th? A. He did.

Q. What did Rayson say when he called you that morning?

A. He told me that the old man had told him to get in touch with me, that I wanted to see him.

Q. And you said this morning by "the old man," that that meant Kelley, is that right?

A. That's right.

Q. What did you say to Rayson?

A. I told him yes, that I wanted to see him.

Q. Did you say anything else except you wanted to see him? A. I don't recall.

Q. You are certain you didn't say anything else in this [107] conversation in the morning except you wanted to see Rayson, is that right?

A. I said I wanted to see him because I wanted to make a purchase of some stuff.

Q. You told him that over the telephone?

A. I did.

Q. Were you the first one that brought up the

(Testimony of Norman Fletcher.)

purchase of stuff from Rayson, or did he bring it up first? A. I was.

Q. You were the first one to mention it?

A. I was.

Q. Did you make an appointment to meet Rayson somewhere that day? A. I did.

Q. Where was that?

A. At 58th and Hoover.

Q. Did you meet him? A. I did.

Q. What time of day?

A. It was around 11:00 o'clock, I would say.

Q. In the morning?

A. In between 10:00 and 11:00. It was between 10:00 a.m., and 11:00 a.m.

Q. Were you in your car? A. I was. [108]

Q. Was Rayson in his car? A. He was.

Q. Did you park on the same side of the street?

A. I was parked there when he drove up.

Q. Did he drive up on the side of you, or did he get out?

A. He drove up beside me, in front of me about 30 feet, in front of me.

Q. And parked and got out?

A. No, he did not. I pulled up behind him and he pulled off and beckoned me around the corner and made a right turn on 57th Street and proceeded half way the block, where he parked and I parked behind him, and he got out of his car and came back and got in the car with me.

Q. To digress for a minute, I ask you if at these conversations you had with Kelley on the 22nd of

(Testimony of Norman Fletcher.)

August 1955 and the 13th of September 1955, did you have a bug or microphone on your body when you were discussing these questions with him?

A. I had one on the second occasion that I talked.

Q. Talked to Kelley? A. To Mr. Kelley.

Q. You didn't have one on the first occasion, did you? A. I didn't.

Q. How were you wired for sound, so to speak?

A. I had a Minifon placed on my person. It was a little [109] microphone that runs up here under my shirt.

Q. Was it a recording device or was it a sending device? A. I don't understand.

Q. A recording device would record it right there. Was that the kind? A. It was.

Q. It was not a sending device, was it? For instance, what I mean by a sending device is such a thing as a loud speaker that puts your voice out and it is picked up by another instrument somewhere else. Was it that type? A. It was not.

Q. What I mean by a recording device is it has a tape or wire and records it right on your person when it takes it.

A. It was a recording device.

Q. Which one was it?

A. It was a recording device.

Q. Did you have that on at any of your conversations with Rayson? A. I did.

Q. Which ones?

(Testimony of Norman Fletcher.)

A. At the meeting when he picked up the money on the 14th.

Q. Is that the only time?

A. That is the only time. [110]

Q. You mean when he picked up the money, that was the time you gave him \$700? A. Yes.

Q. What did you say to Rayson when you met him at 58th and Hoover on the 14th?

A. After I followed his car on 57th Street, he got out of his car and entered my car. I told him I wanted to purchase two ounces of heroin.

Q. There were no devices, sending devices or recording devices in your car, were there?

A. No, there was not.

Q. You didn't have one on that day you met him at 58th and drove around the corner and he got in your car?

A. Not at that time, I didn't have.

Q. At that time?

A. Not at that time.

Q. In that conversation you didn't have it?

A. I didn't have it, that's right.

Q. What did you say to Rayson when he got in the car with you?

A. I asked him, had the old man told him what I wanted. He told me he said to contact me, for him to contact me, and I told him that I wanted to purchase two ounces.

Q. Raise your voice a little bit, please.

A. He told me that Mr. Kelley had told him to contact [111] me.

(Testimony of Norman Fletcher.)

Q. I asked you what you said to him. Did you say to him Mr. Kelley had told you, Fletcher, to contact Rayson? A. No, I didn't say that.

Q. What did you say to him? You must have said something.

A. I asked had the old man told him to contact me and what I wanted.

Q. What did you tell him you wanted?

A. Two ounces of heroin.

Q. Did you say what you would pay for it at that time?

A. No. I didn't tell him what I would pay for it. He told me what it would cost me.

Q. What did you tell him you would be willing to pay for it, if anything?

A. His price was \$350, and I told him it was okay with me.

Q. \$350 an ounce? A. Yes.

Q. You told him that price of \$350 an ounce was okay with you? A. Yes.

Q. Then where did you go from there?

A. I went back to Agent Richards' house.

Q. Then you got a telephone call later on. When did [112] you next happen to hear from Rayson after that? A. At 6:30.

Q. In the evening? A. That's right.

Q. What did he do? Call you at this telephone number at Mr. Richards' home?

A. He did.

Q. Who was there at that time?

(Testimony of Norman Fletcher.)

A. Agent Richards and Deputy Farrington and Deputy Stoups.

Q. And Rayson talked to you on the telephone?

A. He did.

Q. Was there any recording device at that meeting on the telephone? A. There was.

Q. How was it set up?

Mr. Jensen: I am going to object to that, your Honor, as asking for information not shown within the knowledge of this witness.

The Court: If he doesn't know, he can say so. Objection overruled.

The Witness: It was.

The Court: The question was, how was it set up?

The Witness: To the telephone, to the part I had, the receiving part of the telephone. [113]

The Court: You told us on direct examination that you held the receiver up so that somebody else could hear.

The Witness: I did.

The Court: You didn't tell us anything about this recording device.

The Witness: I didn't.

The Court: Where did the recording device take off from? Did it take off from the receiver or from the instrument itself or from the telephone wires?

The Witness: It was a piece something like a piece of rubber placed on the telephone and it was to this machine.

The Court: To the machine?

The Witness: To the recorder.

(Testimony of Norman Fletcher.)

Q. (By Mr. Neblett): Was the whole conversation between you and Rayson at that time taken on this recording device, or whatever you call it? Was it all taken down? A. It was.

Q. The entire conversation?

A. All of the conversation that date.

Q. Who answered the telephone? Did you answer it? A. I answered it.

Q. When it rang? A. I did.

Q. Were there any other telephone calls had during the afternoon? I mean just personal calls that came in? Did you [114] answer the telephone every time? A. I did.

Q. What did you say to Rayson at this time when you said he telephoned to you at Mr. Richards' house at 6:30 in the afternoon, what did you say to Rayson?

A. There was a question asked me before he asked me was I ready, and I told him I was.

Q. What did he say about being ready?

A. Well, he had received the money previous before that, you know.

Q. What?

A. He had received the money previous to that call and it was set that he would deliver the narcotic at 6:30, and he was calling me to tell me where they was and where I could——

Q. To come back to the money, I omitted that. When was this money passed from you to Rayson?

A. That was passed on the second occasion I had of meeting Rayson that day.

(Testimony of Norman Fletcher.)

Q. 50th and Hoover?

A. No. 58th and Main.

Q. I had not covered that conversation. You met him at 58th and Main after you had met him at Hoover Street place? A. Yes.

Q. At that time you handed him \$700 at 58th and Main? [115] A. I did.

Q. Were you in his car or in your car?

A. He got out of his car and got in mine. That was in mine.

Q. Was your car wired for sound at that time?

A. No, it was not.

Q. Did you have on a recording device, on your person? A. I did.

Q. On that day when the money was passed?

A. I did.

Q. What did you say, if you recall, about the \$700?

A. I asked him what did the old man say about giving me a better deal, and he told me if I would buy more than two, I could get the same deal I had been getting before.

Q. Where were the officers when you were at this 58th and Main meeting?

A. Parked just ahead of me.

Q. Where?

A. Parked just ahead of me on the opposite side.

Q. How far ahead of you?

A. I would say about 300 yards.

Q. How close? A. About 300 yards.

(Testimony of Norman Fletcher.)

Q. About 300 yards. You couldn't even see them from where you were, could you? [116]

A. I could.

Q. Weren't there any cars parked in between or anything? A. Not that I recall.

Q. This recording device that you had on at 58th and Main, when you say you delivered the \$700 to Rayson, was that the same recording device you had on in Kelley's place? A. It was.

Q. It was a tape recorder, was it?

A. It was.

Q. Where did you go from 58th and Main?

A. Back to Agent Richards' house.

Q. Before you went to 58th and Main from Mr. Richards' house, do I understand you correctly to say you were given \$860?

A. That's right.

Q. Why \$860? A. I don't know.

Q. Didn't you have any idea what you had to pay for the stuff? A. I did.

Q. How much were you going to pay for it?

A. \$350 an ounce.

Q. You were supposed to get two ounces?

A. I was.

Q. That is \$700, isn't it?

A. That's right. [117]

Q. You say the officers searched you before you went over to see Rayson? A. They did.

Q. And you said this morning they didn't search you when you came back, didn't you?

A. They didn't.

(Testimony of Norman Fletcher.)

Q. Did they search you when you came back?

A. They did not.

Q. They searched you when you went over to see if you had money?

A. On various occasions I have made arrangements with Rayson, he would sometimes bring the package or tell me where I could pick it up. We didn't know just how that deal was going to work out, whether he had brought it with him.

Q. You left Mr. Richards' house with \$860?

A. I did.

Q. You say you gave \$700 to Kelley at 58th and Main, wasn't it? I mean Rayson. Pardon me. You gave \$700 to Rayson at 58th and Main and then you went back to Mr. Richards' house and you gave Mr. Richards' the \$160 back?

A. The \$160 back.

Q. Did Mr. Richards search you to see whether you had the \$700 on you? A. He didn't.

Q. You told him you had given the \$700 to Rayson, is [118] that right?

A. Rayson, I did.

Q. You had another conversation on the telephone later that day with Rayson, did you not?

A. I did.

Q. At what time of the day was that?

A. 6:30 that evening.

Q. Was that conversation recorded, too, on the recording device that you had at Mr. Richards' house? A. It was.

(Testimony of Norman Fletcher.)

Q. Did you ask Rayson, "Where can I pick up the stuff"?

A. No. He told me where to pick it up.

Q. I said did you ask him that.

A. No. He called, I answered the phone, and he asked me was I ready and I told him yes and he told me where to go to pick it up.

Q. That was by the railroad sign you talked about? A. Yes, sir.

Q. Do I understand that all of the telephone conversations that you had with defendant Rayson at Mr. Richards' house were recorded?

A. They were.

Q. All of them, and by this recording device which you mentioned?

A. It was. [119]

Mr. Jensen: I think for the purpose of clarification of your question, are you asking him all the conversation on September 14?

Mr. Neblett: No. I would like to amend the question.

The Court: All of the conversations, I understood.

Mr. Neblett: That's right, all that were had there.

The Witness: That day.

The Court: Well, now, other than that day, all the conversations you had with Rayson, were they recorded?

The Witness: I can't quite understand.

The Court: You had a conversation on the 14th of September. Was that recorded?

(Testimony of Norman Fletcher.)

The Witness: It was.

The Court: You had another conversation on September 14th. That was recorded, was it?

The Witness: All our conversation I had with him on September 14th was recorded.

The Court: Every time Rayson called you on the phone, was that conversation recorded regardless of the date?

The Witness: No, it was not.

The Court: Which dates weren't they recorded?

The Witness: I called him previous to that, before then.

The Court: Previous to what?

The Witness: Before the second meeting, and it was not recorded. [120]

The Court: When did you first talk to Rayson?

The Witness: On the 14th.

The Court: Of August?

The Witness: Of August.

Mr. Jensen: I think you are misleading him, your Honor. It is the 14th of September.

The Witness: September.

The Court: All right. The first time you talked to Rayson was on the 14th of September.

The Witness: 14th of September.

The Court: You tell me on the 14th of September the telephone call was recorded?

The Witness: All of the calls were recorded.

The Court: Then all the calls were recorded when you talked to Rayson, isn't that right?

Mr. Jensen: Your Honor, I am sorry. I don't

(Testimony of Norman Fletcher.)

mean to interrupt. But I think the question is misleading him because it creates the impression that is the only conversation he had on the telephone.

The Court: I am trying to find out and he says the first time he talked to Rayson on the phone was on September 14th.

Mr. Jensen: That is in these transactions, yes.

The Court: I don't care. Any transaction. I asked him what was the first conversation he had with Rayson on the phone and he said September 14th. That was at any time. [121]

Mr. Jensen: At any time in his life?

The Court: No. I mean after August 22nd.

Mr. Jensen: Do I understand your Honor's question to be that was his first telephone conversation with Rayson?

The Court: I am trying to find out if they were all recorded. We started on August 22nd. He just tells me the first telephone call he had with Rayson was September 14th.

Is that correct?

The Witness: That is correct.

The Court: And the telephone calls on that day were recorded?

The Witness: That's right.

The Court: What other date did you talk to Rayson?

The Witness: On the 22nd of September.

The Court: Was that recorded?

The Witness: I don't recall, your Honor. I don't recall whether that conversation was recorded.

(Testimony of Norman Fletcher.)

The Court: That might have been recorded and that might not have been recorded?

The Witness: Yes.

The Court: Did you talk to Rayson on any other day?

The Witness: I did not.

The Court: Just the two days?

The Witness: Just the two days on the telephone.

The Court: All right. [122]

Mr. Neblett: That's all on cross examination, your Honor.

The Court: I would like to finish with this witness this afternoon.

Mr. Jensen: I have a few questions I would like to ask if I may have the indulgence of the court.

The Court: All right. I would like to finish with him this afternoon.

Mr. Jensen: I would like to finish with him while he is here today.

Redirect Examination

Q. (By Mr. Jensen): Mr. Fletcher, I want to bring to your attention or first direct your attention to September 14, 1955. I would like you to enumerate from the early morning through the end of the day the contacts, whether in person or by telephone, that you had with Rayson from the start of the day to the finish. I don't want to know what you did or anything else, but just enumerate them, that is, count them off for us. What was the first one you had with Rayson on September 14?

(Testimony of Norman Fletcher.)

Mr. Neblett: Your Honor please, that has all been asked several times.

The Court: It has been asked and answered, yes, but there might have been some confusion in the witness' mind. I [123] am perfectly willing to have it clarified. The objection is overruled.

Q. (By Mr. Jensen): What was the first contact?

A. At approximately about 10:15 in the morning.

Q. Was it a telephone conversation or a personal conversation?

A. It was a telephone conversation.

Q. When was the next one you had?

A. It was a personal one when I met him at 58th and Hoover.

Q. What was the next one you had?

A. What time was it?

Q. What time was that one, approximately?

A. Approximately, it was between 10:00 and 11:00 a.m.

Q. What was the next contact you had with him?

A. About an hour, telephone conversation.

Q. Did you have more than one telephone conversation there together?

A. In a period of three minutes there was about two phone calls.

Q. In a period of three minutes there were two calls?

A. Yes.

(Testimony of Norman Fletcher.)

Q. What was the next contact you had with him?

A. When I met him at 58th and Main to give him the money. [124]

Q. What was the next contact you had? Wait a minute. What time was it at 58th and Main?

A. It was about 1:00 o'clock, around that time.

Q. What was the next contact you had with him? A. On the telephone at 6:30.

Q. Did you have any other contact with him the balance of that day? A. I didn't.

Q. Your testimony is that this recording device that was used by the officers was used on each of those telephone calls. You recall that definitely?

A. That's right.

Q. And that you had a recording device on you during the conversation you had at 58th and Main?

A. I did.

Q. That is your testimony. Now, go back to the conversation you had with Mr. Kelley in his place of business, which is the second occasion that you saw him on September 13, 1955. You have been asked whether or not you had a recording device on your person at that time, and your testimony, as I understand it, has been yes?

A. Right.

Q. Will you describe for us a moment the physical appearance of the recording device?

The Court: It was concealed, wasn't it? [125]

Mr. Jensen: Yes, but I would like to have him

(Testimony of Norman Fletcher.)

testify as to what the device appeared like when it was not on his person. I have a purpose. This is preliminary, if your Honor will permit me to tie it in.

The Court: All right.

Q. (By Mr. Jensen): Will you tell us the physical appearance of the recording device itself?

A. It is a little small device.

Q. Like a box? A. Yes.

Q. How long would you say it was?

A. About that long.

Mr. Jensen: May the record show he indicates eight or ten inches?

Mr. Neblett: Ten inches.

The Witness: About ten inches.

Q. (By Mr. Jensen): How wide was it?

A. About five or six.

Q. How thick was it? A. About 2½.

Q. Where did you carry it on your person?

A. On my leg.

Q. Was there a switch that would control this device, turn it off and on? A. There was.

Q. Was it on that box? A. It was.

Q. To turn it on or off, what did you have to do while it was on your person as it was that day, September 13th?

A. Just pull a little button that could be pulled through the cloth.

Q. You would have to pull through the cloth of your pants? A. Yes.

(Testimony of Norman Fletcher.)

Q. You have stated you had a microphone up higher on your person. Where was that?

A. Under my shirt pocket. I had a handkerchief.

Q. When you went in to see Mr. Kelley on that date at the time that you have testified to, did you attempt to turn this recording device on?

A. I did.

Q. Did you in fact turn it on? A. I did.

Q. Did you feel the switch through the cloth of your pants to turn it on?

A. I did pull it.

Q. When you got back from that conversation, what did you do with this recording device?

A. It was taken off me by Deputy Farrington.

Q. Is that the last you saw of it on that particular [127] occasion? A. It was.

Q. Now, this telephone number that you were furnished by Mr. Richards of the Bureau of Narcotics, had you had that number some time prior to the meeting with Mr. Kelley and giving it to him? A. I did.

Q. When was the first time you knew Mr. Richards' telephone number?

A. The date, on the 13th.

Q. On the 13th of September?

A. On the 13th of September.

Q. Did you ever furnish this telephone number to any other person other than the defendant Kelley? A. I did not.

Q. Either before or after September 13th?

(Testimony of Norman Fletcher.)

A. I did not.

Q. Is your answer still the same?

A. The same.

Mr. Jensen: I have no further questions.

Mr. Neblett: I might ask one question, your Honor. I am not sure it is proper recross, but I will ask it anyway.

Recross Examination

Q. (By Mr. Neblett): Didn't you have Rayson's address and telephone number [128] at his place of business for a long time before, say, August 22, 1955?

The Court: Rayson?

Mr. Neblett: Rayson, yes, your Honor.

The Court: All right.

The Witness: Did I?

Q. (By Mr. Neblett): Yes, did you?

A. I had it one time.

Mr. Neblett: That's all.

Mr. Jensen: I have no further questions.

The Court: This morning you were giving me certain citations. I said I didn't want them at that stage of the game. Now that there is evidence in the record of the recorders, I would like to have those Circuit Court decisions you want me to look at.

Mr. Jensen: I represented one to be Circuit, but I am not sure that it is. *United States vs. Pierce.*

(Testimony of Norman Fletcher.)

124 Fed. Supp. 264. The second is *Flanders vs. United States*, 222 F.(2d) 163.

The Court: I will read the cases to determine what they stand for. I want to be sure that I have the citations is all.

Mr. Jensen: And I have a civil case, your Honor, which I did not give you before. It is *Reitmeister vs. Reitmeister*, 163 F.(2d) 691. Your Honor already has *Golden vs. United States*, the Supreme Court decision. [129]

The Court: Yes. May I ask a question? Is the rule in federal court relative to wire tapping any different than it is in the state courts?

Mr. Jensen: I am going to have to plead ignorance on that, your Honor.

The Court: Mr. Neblett, is the rule in federal court any different than in the state courts?

Mr. Neblett: It isn't now since the *Cahan* case. It used to be different in the state court.

The Court: The *Cahan* case brought it in accord with the federal decisions, is that right?

Mr. Neblett: California has followed the federal decisions since last May 1955, this year, but up to that time the rule was different in the federal court from the state court.

The Court: I want to find out whether or not the *Cahan* decision applied to this type of situation.

Mr. Neblett: I believe it does, your Honor.

The Court: Do you have the citation on the *Cahan* case?

Mr. Neblett: Yes, I have the case right here.

The Court: Give me the citation and I will read it.

Mr. Neblett: *People vs. Cahan*, 44 Cal. (2d) 434. It was decided April 1955.

The Court: I know. I have read the case, but I want to read it again, and then I will be able to evaluate the evidence from the cases. [130]

Mr. Jensen: Would your Honor give me an opportunity to be heard on this matter?

The Court: Not tonight. If the defendant comes to argue this matter, I will give you the opportunity to be heard.

Mr. Jensen: Thank you.

The Court: Court will now stand in recess until 10:00 o'clock.

(Whereupon, an adjournment was taken to 10:00 o'clock a.m., Wednesday, November 30, 1955.) [131]

Wednesday, November 30, 1955; 10:00 a.m.

The Clerk: No. 24,517 and 24,568, *United States vs. Eugene Rayson and Ollie W. Kelley*, further trial.

Mr. Jensen: The Government is ready.

Mr. Neblett: Ready for the defendant.

Mr. Jensen: Would you like me to continue with the presentation of evidence, your Honor?

The Court: Yes. Call your next witness.

Mr. Jensen: Mr. Richards, will you come forward, please?

MALCOLM RICHARDS

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand and state your name, please.

The Witness: Malcolm Richards.

Direct Examination

Q. (By Mr. Jensen): Mr. Richards, you are a resident of Los Angeles County, California, are you not? A. I am, sir.

Q. You are presently employed by whom?

A. By the Federal Bureau of Narcotics, Treasury Department. [134]

Q. How long have you been so employed?

A. Since 1948.

Q. Have you spent all that time in the Los Angeles area? A. No, sir.

Q. How long have you been so employed in the Los Angeles area? A. Since 1952.

Q. Are you acquainted with the witness that preceded you on the stand, Norman Fletcher?

A. I am.

Q. When did you first become acquainted with Norman Fletcher?

A. Well, it was prior—it was in the early part of 1954.

Q. Are you acquainted with the defendants, Mr. Kelley and Mr. Rayson?

A. I have seen them.

Q. Calling your attention to the date of August

(Testimony of Malcolm Richards.)

22, 1955, I will ask you whether or not you saw Mr. Fletcher on that date?

A. I did, sir.

Q. Approximately what time of the day?

A. It was early in the morning on that date, August 22, 1955.

Q. What is early in the morning?

A. I would say approximately 8:00, about 8:30 in the morning. [135]

Q. Where was it that you saw him?

A. I met him at my home here in Los Angeles.

Q. Were there other people present on that occasion? A. Yes, sir, there were.

Q. Would you state who else was present?

A. There were Sergeant Landry, Deputy Sheriffs Farrington, Stoups, and Gillette, and myself.

Q. Did you go anywhere from there?

A. We did, sir.

Q. Did anyone accompany you?

A. Yes, sir. I was with Sergeant Landry.

Q. Did you go in a vehicle or on foot?

A. We went in a vehicle.

Q. Where did you go?

A. Well, we went to several other places on a different investigation.

Q. Let me ask you this. Did you go at some time during the morning of August 22, 1955, somewhere in the vicinity of the La Jolla Cleaners on Sixth Street in Los Angeles? A. We did.

Q. Approximately what time was it that you went there?

(Testimony of Malcolm Richards.)

A. It was around noon, around 12:15.

Q. Did you observe whether or not Mr. Fletcher was in the vicinity of the La Jolla Cleaners?

A. Yes, sir, I did. [136]

Q. Would you relate to us what you did observe while you were in the vicinity of the La Jolla Cleaners?

A. Well, I observed Fletcher drive up and park a car in front of the La Jolla Cleaners, which is located at 804 East Sixth Street in Los Angeles. He got out of his car and entered the establishment. In the meantime, I had gotten out of the car in which I was riding and walked past the cleaners, and I observed him engaged in conversation or appear to engage in conversation with Mr. Kelley.

Q. Did you hear anything that was said in that conversation? A. No, sir, I did not.

Q. This man that you say is Mr. Kelley, is that the defendant who is sitting over here?

A. In the gray suit, the first one at the table there.

Q. That is the gentleman you saw talk to Mr. Fletcher on that occasion?

A. Yes, sir, I did.

Mr. Jensen: May the record show he indicates the defendant Kelley?

The Court: The record may so show.

Q. (By Mr. Jensen): Did you pass by the La Jolla Cleaners on more than one occasion at that time? A. Yes, sir, I did.

Q. How many occasions? [137]

(Testimony of Malcolm Richards.)

A. Twice.

Q. Will you state what you observed the second time you passed by?

A. Well, I walked east on Sixth Street and passed the cleaners. Then I turned back and walked west on the same street and rejoined Sergeant Landry.

Q. Immediately after that, where did you go?

A. Sergeant Landry and myself then followed Fletcher away from the area and we returned to the vicinity of my home.

Q. Now, calling your attention to September 13, 1955, did you have occasion to see Norman Fletcher on that date? A. I did, sir.

Q. Was that also at your home?

A. That is correct, sir.

Q. Could you give us an approximate time of the day?

A. It was around 7:30 in the morning.

Q. Were there others present at that time?

A. Yes, sir, there were.

Q. Would you state who they were, please?

A. They were the same crew, that is, Sergeant Landry, Deputy Sheriffs Farrington, Gillette and Stoups, and myself.

Q. Did you have occasion to leave your place to either accompany or follow Mr. Fletcher on that day? A. I did.

Q. Would you state where it was that you went? [138]

A. We drove to the vicinity of the La Jolla

(Testimony of Malcolm Richards.)

Cleaners, that is, Farrington and myself drove in my car to the vicinity of the La Jolla Cleaners.

Q. Excuse me. On this occasion were you accompanied in your vehicle by Farrington?

A. I was, sir.

Q. Continue.

A. At that time we observed that Mr. Kelley was in his cleaners at that time. Then Officer Farrington and Mr. Fletcher left the area and in a short while they returned. In the meantime I had stayed in the vicinity of the cleaners.

When they returned, I observed Fletcher as he pulled up in front of the cleaners and parked his car and got out of the vehicle and entered the cleaners. He stayed in there about five to 10 minutes, after which he entered his car and drove away and was followed by Officer Farrington and myself.

Q. Did you observe Mr. Fletcher or Mr. Kelley or both of them while they were inside the cleaning place of business there on that occasion?

A. I did, sir.

Q. Would you state whether or not they appeared to be in conversation?

A. They appeared to be in conversation, sir.

Q. Were you able to overhear anything on this occasion?

A. No, sir, I was not. [139]

Q. Did you leave your vehicle on this occasion?

A. Yes, sir. I got out and walked on the streets again.

Q. Calling your attention to the date of September—I will withdraw that.

(Testimony of Malcolm Richards.)

Prior to this meeting of September 13, 1955, had you had occasion to give a telephone number to Mr. Fletcher? A. I did, sir.

Q. Whose telephone number did you give him?

A. I gave him my home phone number.

Q. Would you state whether or not your home phone number is listed in the telephone directory?

A. It is unlisted.

Q. It does not appear in the directory?

A. No, sir.

Q. When did you first give him this number?

A. I gave it to him on the morning of September 13, 1955.

Q. Calling your attention now to the day of September 14, 1955, did you have occasion to see Mr. Fletcher on that occasion? A. I did, sir.

Q. Where did you first see him on that date?

A. He came over to my house.

Q. At approximately what time?

A. Between 7:30 and 8:00 a.m. on that morning.

Q. How long did he remain there at your place?

A. Well, we remained there until about 10:35 a.m., at [140] which time Fletcher left and he was followed by myself and Officer Farrington.

Q. Now, just a moment. During that period that you were there, will you state who was present in the house?

A. There was Fletcher, Officer Farrington, and myself.

Q. Are you a married man, Mr. Richards?

A. I am, sir.

(Testimony of Malcolm Richards.)

Q. Was your wife in the house?

A. No, sir.

Q. Then the people you have enumerated are all the people that were in the house?

A. That were present at that time, yes, sir.

Q. While you were there on that occasion did a telephone call come in?

A. That is correct, sir.

Q. More than one or just one?

A. There was just one telephone call came in at approximately 10:15 a.m.

Q. Who answered the phone?

A. Fletcher did.

Q. Did anyone in addition to Mr. Fletcher listen to that call at the receiving end of the phone?

A. Yes, sir.

Q. Who was it?

A. Officer Farrington. [141]

Q. Do you recall what was said by Mr. Fletcher during that telephone conversation?

Mr. Neblett: If your Honor please, that is hearsay. We object to it on that ground.

The Court: What do you mean, it is hearsay?

Mr. Neblett: He wouldn't know who Fletcher was talking to.

The Court: He could report Fletcher's end of the conversation, couldn't he?

Mr. Neblett: I wouldn't think so, your Honor. It is hearsay, something that took place—so far as we know, it might have been possible that this witness was just talking.

(Testimony of Malcolm Richards.)

The Court: It is hearsay as to the defendants.

Mr. Jensen: It would appear so, your Honor, but I think it comes within one of the well recognized exceptions. This is part of the *res gestae* itself. This is the very fact of the purchase and sale. To accomplish the sale, you have to enter into some sort of agreement and this conversation, it is our theory, and we have already shown preliminarily what the conversation was about, is a part of that agreement.

The Court: Mr. Neblett, Fletcher testified as to what he said over the phone. There was no objection then as to hearsay.

Mr. Neblett: I know, your Honor, but he laid a foundation for his testimony. He said he called and recognized—I objected to the testimony at first on the ground there was no foundation, and if your Honor will allow me, I will add that objection [142] to this telephone conversation, also. Fletcher testified that he was called there by Rayson at this number.

The Court: I know.

Mr. Neblett: And he recognized Rayson's voice.

The Court: It is already in the evidence that Fletcher talked to someone. This witness is asked, what did Fletcher say to someone? Fletcher has already testified to what he said, hasn't he?

Mr. Neblett: He has, your Honor.

The Court: It is already in evidence. How can you be harmed if this witness testifies when it is already in the evidence?

(Testimony of Malcolm Richards.)

Mr. Neblett: I don't know that I would be harmed by it. I didn't want to clutter up the record. Our stand in this case, your Honor, is that this was an entire deal in which they went out to get Kelley particularly, and Rayson.

The Court: I don't know. Maybe I will agree with your theory of entrapment, but I don't know yet. I haven't heard the evidence. Objection overruled.

Q. (By Mr. Jensen): Would you relate that portion of the telephone conversation which you had at that time, which was the words of Mr. Fletcher?

A. To the best of my recollection, I heard Fletcher say, "Hello. Who is this? FA * * * the old man told you to call me, huh? * * * Well, I want to see you * * * Meet you where? * * * 58th [143] and Hooper or Hoover? * * * Okay. I'll be there."

Q. Now, you have stated, I believe, that you left sometime just after 10:00 o'clock. Did Mr. Fletcher leave at that time?

A. Yes, he did.

Q. Did he leave by himself?

A. No, sir. Well, we all left approximately at the same time.

Q. Tell us what happened about the leaving.

A. At the completion of the call, I searched the person of Mr. Fletcher and furnished him \$860 of official advanced funds.

Farrington and myself then went to Fletcher's car, where Farrington searched the glove compartment and other parts of the car.

(Testimony of Malcolm Richards.)

Then Fletcher entered his car and drove away, and Farrington and myself then entered another vehicle. We followed Fletcher to the vicinity of 58th and Hoover, where I got out of Farrington's vehicle and got in the streets. Fletcher was parked on the northeast corner of 58th and Hoover. My position was—I was standing in the doorway of a loading platform, while Deputy Farrington was parked approximately a block and a half north on Hoover, facing Fletcher's car.

At approximately 10:45 a.m., I observed Rayson as he was heading north on Hoover, driving a 1955 green Mercury, Montclair. [144] He pulled just ahead of Fletcher's vehicle and stopped for a minute.

At that time Fletcher pulled out in his car and followed Rayson and they both proceeded east on 57th Street, where they stopped about the middle of the block. At that time I observed Rayson as he got out of his car.

Q. Let me interrupt just a minute, Mr. Richards. How did you get around on 57th? Did you walk?

A. No. At that time Officer Farrington had driven up and picked me up right there on the corner at 57th and Hoover, and we parked quite a distance back, or, rather west from where the defendant and Fletcher were parked.

Q. When you say the defendant, you mean the defendant Rayson? A. Rayson.

Q. From where you and Mr. Farrington stopped

(Testimony of Malcolm Richards.)

in your vehicle, were you able to observe Mr. Fletcher and the defendant Rayson?

A. Yes, sir, we were.

Q. Would you tell us what you saw?

A. Well, I saw Rayson get out of his car and he entered Fletcher's car, where they stayed for about 10 or 15 minutes. Rayson then got out of Fletcher's car and re-entered his vehicle and drove away.

In the meantime, Fletcher made a U-turn and passed us as [145] he was heading westward on 57th Street.

Q. Thereafter, did you return to your home?

A. I did, sir.

Q. And Mr. Fletcher, also? A. Yes, sir.

Q. Did you remain there for a while?

A. Yes, sir, we did.

Q. Would you state whether or not another telephone call came in thereafter?

A. Yes, sir, there was.

Q. Was there more than one telephone call that came in? A. There were two calls.

Q. Would you state when the first of these came in?

A. It was approximately 11:55 or 11:57, maybe.

Q. Just before noon?

A. That is correct, sir.

Q. On that occasion, who answered the phone?

A. Fletcher did.

Q. Would you state the approximate length of time of that conversation?

(Testimony of Malcolm Richards.)

A. I would say approximately a minute or so.

Q. Thereafter, was there another telephone call come in?

A. That is correct, sir. About five minutes afterwards.

Q. Who answered the phone on that occasion?

A. Fletcher again answered the telephone. [146]

Q. Would you state the length of time of that conversation?

A. It was longer than the first. I would say about two to three minutes.

Q. Were you able to hear what Mr. Fletcher said into the phone on those two telephone calls?

A. I did.

Q. Would you relate to the court your memory of what was said by Mr. Fletcher on that occasion, the first call first, please.

A. Well, you know, he said hello, and then he said if he can make it earlier. He said, "Can you make it earlier?"

Then at that time he said, "Okay. I will get a pencil," and then he took down several numbers on a piece of paper, then he said okay, and then he hung up the phone.

Q. Now, would you relate what you heard Mr. Fletcher state in the second telephone conversation?

A. Well, he answered. Then he said, "5:00 o'clock will be a little too late," as he had to pick up his girl friend way out in Beverly Hills.

Then he said 6:30 would be all right.

(Testimony of Malcolm Richards.)

Then he said, "I have the money and I don't want to keep it all the time. Do you want it?"

Then he said, "58th and Main?" And then he hung up.

Q. Now, going back for a moment, immediately following [147] your return to your home from 58th and Hoover, at that time did Mr. Fletcher still have the \$860 that you had given him?

A. Well, after I met him on the first time, after he returned to my home, he returned the full amount of money, \$860, to me.

Q. He had given it back to you?

A. He had given it back to me.

Q. Now, was there anyone listening to these two telephone conversations that you have now testified to, that is, at the receiving end of the telephone that Mr. Fletcher was holding?

A. Farrington did, Officer Farrington.

Q. After these two telephone calls came in, did you have occasion to leave your home again, Mr. Richards? A. I did.

Q. Did Mr. Fletcher leave, also?

A. Yes, sir.

Q. Did you leave in the company of anyone?

A. I was again with Officer Farrington.

Q. Was Mr. Fletcher in his vehicle on that occasion when he left? A. He was, sir.

Q. Did you follow him or accompany him wherever he went?

A. Well, we followed him, you know, from a distance.

(Testimony of Malcolm Richards.)

Q. Would you tell us what you observed on that occasion? [148]

A. Well, on that occasion, we saw Fletcher as he was parked on the——

Q. First of all, where did he go?

A. He went to the vicinity of 58th and Main, between Main and Broadway.

Q. Let me interrupt again, Mr. Richards. Had you already delivered the money to him on this occasion? A. I did, sir.

Q. Go ahead.

A. Officer Farrington and myself were parked on 57th Street—no, on 58th Street, between Main and Broadway. At that time we saw Rayson get out of his car and walk across the street to the north side of the street, where he stood up right next to the driver's side of the car.

Q. Of whose car?

A. Of the car in which Fletcher was driving. They appeared to be engaged in conversation, after which Rayson returned to his car, and Fletcher passed us and drove by us.

Q. Did you keep Fletcher and Rayson under observation while they were together at the car?

A. Yes, sir, I did.

Q. Would you state whether or not you saw anything pass from Mr. Fletcher to Mr. Rayson?

A. No, sir, I did not see anything pass at that time. You see, Rayson was leaning over the door of the driver's side [149] where Fletcher was seated.

Q. Did he have his head inside the window?

(Testimony of Malcolm Richards.)

A. Well, no. He was looking westward on 58th Street, and he had his head outside of the window. However, his hand was right by the door.

Q. From the position that you had at that time, Mr. Richards, were you looking at Mr. Rayson's back or his front or side, which?

A. We were looking at his front. He was sideways.

Q. After this occurred, did you return again to your home? A. I did, sir.

Q. Did Mr. Fletcher also drive there?

A. Yes, sir.

Q. Now, approximately what time was it that this meeting occurred?

A. It was approximately 12:20 p.m.

Q. Now, later in the day did you have another occasion to be at your home with Norman Fletcher?

A. Yes, sir.

Q. Approximately what time was that?

A. He arrived at my home approximately 6:00 p.m. that evening.

Q. Were there others present at your home at that time? A. Yes, there were. [150]

Q. Would you state who they were, please?

A. It was Officer Farrington and myself and my wife.

Q. Sergeant Landry was not with you on that occasion? A. No, sir, he was not.

Q. Did a telephone call come in on that occasion? A. Later.

Q. At approximately what time?

(Testimony of Malcolm Richards.)

A. At approximately 6:35 p.m.

Q. Would you state who answered the telephone?

A. Fletcher did. Fletcher answered the phone.

Q. Did you hear what he had to say into the telephone on that occasion?

A. Yes, sir, I did.

Q. Would you relate to the court what you heard? Now, let me interrupt for a moment. On this occasion, was there someone listening at the hand set of the telephone?

A. Yes, sir.

Q. Who was that?

A. I was.

Q. On this occasion, did you hear both sides of the conversation?

A. I did.

Q. Would you relate to the court the conversation that you heard on that occasion?

A. Well, when Fletcher answered the phone, a man's voice [151] stated, "Are you ready?"

And Fletcher said, "Yes."

Then the man's voice said, "The stuff is at 58th and Budlong." He said, "Look right at the bottom of a railroad sign, a RR sign." The stuff would be in a brown bag under a bottle which was in another brown bag.

Fletcher said, "Okay."

Then the man's voice stated, "Say, I am going to give you a number," and he then asked Fletcher if he had a pencil and Fletcher said yes. Then he read off a number to Fletcher, which Fletcher wrote down, and he stated—

Q. What kind of a number was this?

(Testimony of Malcolm Richards.)

A. It was an Adams prefix.

Q. A telephone number?

A. Yes, sir, a telephone number.

Q. Continue.

A. The voice said, "If you want to get in touch with me, call this number and just say that the Mercury called."

Then Fletcher repeated, "I will say the Mercury called."

Then the other man's voice said, "You get it?"

So Fletcher said, "Yes."

So that was the extent of the conversation?

Q. After that telephone call came in what did you do?

A. Well, Farrington—no, Fletcher and myself then left my house. [152]

Q. Did you leave in a vehicle?

A. In Fletcher's car.

Q. Who drove? A. Fletcher was driving.

Q. Where did you sit?

A. I sat in the passenger side in the front seat of the car.

Q. Alongside of the driver?

A. That is correct, sir.

Q. Continue.

A. Fletcher and myself entered Fletcher's vehicle and was followed by Officer Farrington. We drove to the vicinity of 58th and Budlong, where Fletcher pulled right next to a white railroad sign. I got out of the car and walked to the sign, stooped down and picked up a brown paper bag which con-

(Testimony of Malcolm Richards.)

tained a bottle, and under this bottle there was another brown paper bag. I then placed it in my pocket.

Q. The second one?

A. Yes, the second one.

Q. The one on the bottom?

A. That is correct, sir.

Q. All right.

A. I then placed it in my pocket, and we drove and returned back to my residence.

Q. I show you, Mr. Richards, a photograph which has been [153] marked United States Exhibit No. 1, and I will ask you whether or not you recognize the scene shown in that photograph?

A. I do, sir.

Q. Would you state what it is?

A. It is a picture of the area of 58th and Budlong. The next street going south on Budlong is Slauson, where the railroad tracks are.

Q. Was the picture taken with the camera facing south, pointing south?

A. Apparently it was. I was not there when the picture was taken.

Q. I understand, but from the picture?

A. Yes, it is taken facing south.

Q. Does there appear in the photograph a railroad sign that you have testified about?

A. Yes, sir.

Q. Would you say that picture is a fair representation of the scene as it appeared at the time that you were out there?

A. Yes, it is.

(Testimony of Malcolm Richards.)

Q. There is this difference, isn't there, Mr. Richards, the brown paper sack you picked up is no longer there in the picture? A. No, sir.

Q. Did you keep the brown paper sack you picked up and put in your pocket? Did you keep that in your possession? [154] A. I did.

Q. Where did you take it?

A. Later that evening we took it—

Q. Let's talk about right then. Did you take it back to your house?

A. Yes, sir. We returned to my house, to my home, and I opened it and showed it to the other officers, that is Farrington, Landry, Stoups, and Mr. Fletcher was also there at that time.

Q. Did you reveal to them the contents of the sack?

A. Yes, sir. I showed it to them.

Q. Did you keep it after that?

A. Yes, sir. I retained it in my possession.

Q. What did you do with it?

A. Well, we left my home and we came down to the office of the Bureau of Narcotics, Room 1755 of this building. There I transferred the contents of the—I mean which was in that package.

Q. What was in the brown paper sack?

A. It was a white powder.

Q. Was it in separate containers itself?

A. There was four separate cellophane bags which contained the white powder.

Q. Did you open those little bags?

A. I did, sir. [155]

(Testimony of Malcolm Richards.)

Q. What did you do with the contents?

A. I transferred the contents into another container, into four other containers.

Q. Bag for bag?

A. That is correct, sir.

Q. Now, what did you do with the new containers?

A. I placed them in a locked sealed envelope and gave it to Agent Davis, who placed it in the office safe.

Q. Did he place it in the safe in your presence?

A. He did.

Q. This was on the evening of September 14th?

A. That is correct, sir.

Q. When did you next see the contents of that locked envelope you spoke of, I mean not the contents, but when did you next see the envelope itself?

A. I saw it the following day, September 15th.

Q. Did you examine it to determine whether or not it had been disturbed or tampered with?

A. It was not disturbed or tampered with.

Q. What did you do with it on that occasion?

A. Well, on that occasion I placed it in another envelope which was addressed to Mr. R. F. Love, the ATU chemist in San Francisco. Then I took it downstairs and sent it to San Francisco via registered mail.

Mr. Jensen: May I have a moment, your Honor. Will you [156] mark this, please?

The Clerk: Government's 2 for identification.

(Testimony of Malcolm Richards.)

(The exhibit referred to was marked Government's Exhibit 2 for identification.)

Q. (By Mr. Jensen): Mr. Richards, would you assist me in opening this, please? I see it is just stapled across the top.

A. Yes, it is just stapled in the back.

Mr. Jensen: Let's mark that envelope then.

The Clerk: 2-A for identification.

(The exhibit referred to was marked Government's Exhibit 2-A for identification.)

Mr. Jensen: For the purpose of the record, the proposed exhibit 2-A will be only the brown envelope marked, and if the court will permit us to, we will further identify and mark the contents of this envelope at a later time.

The Court: That's all right with me, if there is no objection.

Mr. Jensen: I don't wish to open it at this time. I will get my exhibits labeled at the recess and save a little time.

Mr. Neblett: Very well.

Q. (By Mr. Jensen): Mr. Richards, I show you what has been marked proposed Exhibit 2 and 2-A. I will ask you to state whether or not you can identify those two exhibits? [157]

A. I can, sir.

Q. Let's take No. 2 first. Would you state for the record what it is and whether or not you have seen it on a prior occasion?

A. This is the envelope in which I placed Exhibit 2-A on September 15, 1955.

(Testimony of Malcolm Richards.)

Q. Is that the envelope which you mailed, as you have testified just now?

A. That is correct, sir.

Q. Will you state to the court and for the record what the proposed Exhibit 2-A is?

A. This is a locked, sealed envelope in which I placed the four packages on the night of September 14, 1955. I recognize it because it is my writing, and also my initials, date, weight and sealed 9-14-55.

Mr. Jensen: I think, perhaps, your Honor, I am going to have to have that opened now.

Q. Would you open the envelope and take the contents out? We are now dealing with Exhibit 2-A.

(Witness complying.)

Mr. Jensen: May the record show, your Honor, that the top of 2-A was stapled at the time of delivering to the witness?

The Court: The record may so show.

Q. (By Mr. Jensen): Would you hand me the contents, Mr. [158] Richards?

(Witness complying.)

Mr. Jensen: Would you mark these, please?

The Court: They may be marked 2-B, -C, -D and -E.

The Clerk: 2-B, -C, -D and -E.

(The exhibits referred to were marked Government's Exhibit 2-B, -C, -D and -E for identification.)

Q. (By Mr. Jensen): I show you United States proposed Exhibits 2-B, 2-C, 2-D and 2-E, Mr.

(Testimony of Malcolm Richards.)

Richards. I ask you whether or not you have seen those before? A. Yes, sir, I have.

Q. Did you mark those envelopes in such a way as to identify them to you? A. Yes, sir.

Q. In what way did you mark them?

A. My initials M. R. and the date 9-14-55 are on each individual package.

Q. Now, those are four small envelopes, are they not, relatively transparent, white?

A. That is correct, sir.

Q. Are those the envelopes that you have previously testified about in regard to transferring the contents of the other four envelopes?

A. That is correct, sir. These are the four.

Q. Then these are the envelopes—well, you state it [159] for the court. What are these envelopes actually?

A. These are cellophane bags in which I transferred the contents from the original containers which were also cellophane bags.

Q. Now, if we can refer to these as the first set and second set, these were all found in the brown paper bag, is that correct? A. Yes, sir.

Q. Did you prior to the occasion of mailing this material weigh the contents?

A. I did, sir.

Q. Do you recall at this time what the gross weight of the four containers was?

A. To the best of my recollection it is two ounces and 82 grains.

(Testimony of Malcolm Richards.)

Q. That is the aggregate of all four containers?

A. That is correct, sir.

Q. I don't know if you have testified, but if you have, will you do it again, will you tell us to whom you addressed this envelope?

A. To Mr. R. F. Love, the ATU chemist in San Francisco, California.

Q. Mr. Richards, do you still have the original containers? A. I do, sir. [160]

Q. Do you have them with you now, or are they in the courtroom?

A. They are in the courtroom.

Mr. Jensen: May I have a moment, your Honor, to have him step down and retrieve them?

The Court: Yes.

(Witness leaving stand and returning.)

Q. (By Mr. Jensen): Now, would you give me the original containers?

Mr. Neblett: May I ask the court to have counsel exhibit these to us, please?

Mr. Jensen: These are mounted on paper. I don't know if you have any objection.

Will you mark these, please, Exhibit 3?

The Clerk: 3 for identification.

(The exhibit referred to was marked Government's Exhibit 3 for identification.)

Mr. Jensen: And also these.

The Clerk: 3-A, 3-B, 3-C and 3-D for identification.

(Testimony of Malcolm Richards.)

(The exhibits referred to were marked Government's Exhibits 3-A, -B, -C and -D for identification.)

Q. (By Mr. Jensen): Mr. Richards, I show you what has been marked for identification proposed exhibit of the United States 3, 3-A, 3-B, 3-C and 3-D. Taking them in order, would you tell us whether or not you have ever seen proposed exhibit [161] 3 before? A. Yes, sir, I have.

Q. What is that?

A. This is a brown paper bag, together with a rubber band in which the other exhibits, 3-A, 3-B, 3-C and 3-D are contained.

Q. Is that the brown paper bag that you picked up at the base of the RR sign, as you have previously testified? A. This is it, sir.

Q. Did you mark it in some way so you could identify it yourself?

A. I did. My initials M. R., the date, and the time, are marked right here at the bottom.

Q. Are there other initials on there?

A. Yes, sir.

Q. Do you recognize those? A. Yes, sir.

Q. Or were they placed there in your presence?

A. They were.

Q. Are they of some of the other officers that were connected with this matter?

A. They are, sir.

Q. Was the bag in that condition at the time that you picked it up?

A. No, sir, it was not. [162]

(Testimony of Malcolm Richards.)

Q. Had it been torn at that time?

A. No, sir, it was not.

Q. Had it been discolored at that time?

A. No, sir.

Q. Now, calling your attention to the envelopes that are now marked proposed Exhibits, which are marked 3-A, 3-B, 3-C and 3-D, would you state whether or not you have seen those before?

A. Yes, sir. These exhibits——

Q. Will you state what they are?

A. All of these——

Q. When you say all of these, you are talking about Exhibits 3-A, -B, -C and -D?

A. That is correct, sir. These were the original cellophane bags in which the contents of Exhibit 2-B, 2-C, 2-D and 2-E were placed, or were.

Q. They were the ones that you found them in?

A. That is correct.

Q. At the time you found them, they were inside the proposed Exhibit 3?

A. The brown paper bag.

Q. 3-A, -B, -C and -D are mounted on paper, are they not? A. Yes, sir.

Q. There is some writing on the paper. Is that yours? [163] A. Yes, sir.

Q. Did you number the bags you had at that time? A. I did, sir.

Q. Those are the numbers that are contained, are they not, on the paper mountings?

A. That is correct, sir.

Q. At the same time as you weighed the sub-

(Testimony of Malcolm Richards.)

stance, did you also record the weight on the paper on which those bags are mounted?

A. That's right, sir.

Mr. Jensen: If the court please, we will offer at this time the United States proposed Exhibits 2, 2-B, 2-C, 2-D and 2-E, and 3, 3-A, 3-B, 3-C and 3-D.

The Court: They may be received in evidence. Any objection?

Mr. Neblett: Yes, your Honor.

The Court: All right.

Mr. Neblett: We object to the admission of these exhibits for identification and all of them in evidence upon the grounds no foundation has been laid so far for their admission. So far as we know now, they were picked up by these officers and Fletcher under a railroad sign at the corner of Budlong and Slauson. No connection whatever is shown——

The Court: I think that goes to the weight of the evidence, not to the admissibility. [164]

Mr. Neblett: If your Honor please, there is no showing whatever that this witness had anything to do with it at all except that as far as this witness is concerned, he testified he listened to a telephone conversation, but he doesn't know whether he was talking to Rayson or not.

The Court: He testified he picked up this bag. This is the contents he picked up. That's all. He is not testifying who put them there. He is not testifying how it got there. He just testified he went down

(Testimony of Malcolm Richards.)

there at this particular place and found a bag and picked it up.

Mr. Neblett: He did testify he listened to a telephone conversation that told him where to go and get it.

The Court: That is correct.

Mr. Neblett: But he doesn't know whether that was Rayson, and there is no proof that that was Rayson by Fletcher or anybody else.

The Court: That goes to the weight of the evidence and not the admissibility. Objection overruled. It may be received.

Mr. Jensen: I think I neglected to mention 2-A. In the event I did, I move also that 2-A be admitted in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibits 2, 2-A, 2-B, 2-C, 2-D, 2-E, and 3, 3-A, 3-B, 3-C and 3-D.

(The exhibits were received in evidence as Government's Exhibits 2, 2-A, 2-B, 2-C, 2-D, 2-E, 3, 3-A, 3-B, 3-C and 3-D.)

Q. (By Mr. Jensen): Mr. Richards, have you had some conversations with the witness Fletcher relative to investigating cases or aiding the Bureau of Narcotics or its officers in apprehending [165] people engaged in the narcotics traffic? I am not asking you the conversation, but just whether or not you have had some.

A. Yes, sir, I did.

Q. Have you had such conversation on more than one occasion? A. Yes, sir.

(Testimony of Malcolm Richards.)

Q. Can you tell us approximately when the conversations first commenced between yourself and Mr. Fletcher?

A. In approximately the middle of February of this year.

Q. Can you give us some idea of how many conversations you have had? Let's do it this way. About how frequently would these conversations occur?

A. I would say I would see him practically every day.

Q. And these conversations were always in relation to investigations that your office was conducting? A. That is correct, sir.

A. Now, calling your attention approximately to July of 1955, I will ask you whether or not there was a change in the policy that had theretofore existed in the Bureau relative to purchasing narcotics either by special employees or other members of the Bureau of Narcotics. Was there a change in policy at that time? A. Yes. [166]

Mr. Neblett: If your Honor please, we object to that question on the ground it is a policy established by a department of the government.

The Court: What difference does it make?

Mr. Jensen: If the court please, the defense counsel developed yesterday that nothing had been done for some time in relation to the defendants Kelley and Rayson by Mr. Fletcher, although he had been in discussions with this man for some time.

(Testimony of Malcolm Richards.)

The Court: You can't convict a defendant by showing the policy of the government.

Mr. Jensen: No, no, your Honor. The only thing I wish to show is why this investigation was not undertaken until August of this year.

The Court: Objection sustained.

Mr. Jensen: May I have just a moment, your Honor?

The Court: We might take our morning recess. I would like for you to get through with this witness, but if we proceed and get through now, you would have still two or three more questions to ask, and if we take the recess now, you can think them up in the meantime. We will now recess until five minutes after 11:00.

(Recess.)

Mr. Jensen: Will you mark this, please?

The Clerk: Government's Exhibit 4 for identification. [167]

(The exhibit referred to was marked Government's Exhibit No. 4 for identification.)

Q. (By Mr. Jensen): Mr. Richards, calling your attention to the sacks now denoted Government's Exhibits 2-B, 2-C, 2-D and 2-E, that is the second set of containers, will you state whether or not they were new and clean containers at the time that you transferred the contents of the original containers to them? A. They were.

Q. They hadn't been used before?

A. No, sir.

Q. I now hand you the Government's proposed

(Testimony of Malcolm Richards.)

Exhibit No. 4, which is a photograph. I ask you whether or not you recognize the objects therein photographed. A. I do.

Q. Were you present at the time that this photograph was taken? A. I was, sir.

Q. Will you state to the court when it was taken?

A. It was taken on the evening of September 14, 1955.

Q. And would you state what the objects there photographed are?

A. These are the original four cellophane bags which were in the brown paper bag that I picked up from the railroad sign on that same day. [168]

Q. As photographed there, are they in the original condition prior to their having been opened by you? A. They are.

Q. Would you say that the photograph is a fair representation of their physical appearance in the condition that they were after you had removed them from the brown paper bag?

A. Yes, sir.

Mr. Jensen: The United States will offer its proposed Exhibit No. 4 for admission.

The Court: It may be received in evidence.

The Clerk: Exhibit 4.

(The exhibit referred to was received in evidence and marked as Government's Exhibit No. 4.)

Q. (By Mr. Jensen): Mr. Richards, calling your attention to September 22, 1955, would you state

(Testimony of Malcolm Richards.)

whether or not on that date you saw Mr. Fletcher?

A. I did, sir.

Q. Where was it you first saw him on that day?

A. Over at my home.

Q. Approximately what time?

A. It was around 8:30, between 8:30 and 9:00 o'clock that morning.

Q. Were there others present on that occasion?

A. There were. [169]

Q. Would you state who they were?

A. Sergeant Landry, Deputy Sheriffs Farrington, Stoups, and myself.

Q. Did you go from your home to some other locality? A. We did.

Q. Would you tell us about that, please?

A. We went down to the vicinity of the La Jolla Cleaners, 804 East Sixth Street, Los Angeles.

Q. Did Mr. Fletcher go down there, too?

A. Yes, sir.

Q. Was he by himself or with others?

A. He was in his car by himself.

Q. Would you give us the circumstances of what you saw and observed after you arrived at the vicinity of the La Jolla Cleaners?

A. I observed Fletcher get out of his car and enter the cleaners, after which I saw him and Mr. Kelley leave the cleaners, at which time I observed Kelley as he was sweeping directly in front of his establishment, the sidewalk in front of his establishment.

Q. Did they come out of the cleaners together?

(Testimony of Malcolm Richards.)

A. Yes, sir.

Q. Did they remain together on the sidewalk?

A. That is correct.

Q. You say Mr. Kelley was sweeping the sidewalk? [170]

A. That is correct.

Q. Would you state whether or not they appeared to be in conversation?

A. They did appear to be in conversation.

Q. Would you tell us approximately what time this meeting occurred?

A. It was approximately 10:20 a.m.

Q. What was its duration? How long did it last?

A. I would say for about five minutes.

Q. And thereafter did you leave?

A. Yes, sir.

Q. And return to your home?

A. That is correct.

Q. Did Mr. Fletcher join you there?

A. He did, sir.

Q. Did you remain there at your home for some time?

A. We did.

Q. Did Mr. Fletcher remain there with you?

A. Yes, sir.

Q. Would you state whether or not a telephone call came in that day?

A. Yes, sir.

Q. At approximately what time?

A. The call came in at approximately 1:15 p.m.

Q. Who answered the phone? [171]

A. Mr. Fletcher.

Q. Was someone other than Mr. Fletcher listening at the telephone headpiece?

(Testimony of Malcolm Richards.)

A. Yes, sir.

Q. Who was it on this occasion?

A. Officer Farrington.

Q. Do you recall at this time what was said by Mr. Fletcher during that telephone conversation?

A. Well, he answered the telephone and I heard him say, "Two pieces, the same as before, the same as the last deal." Then he said, "49th and Hoover."

Q. I didn't hear you.

A. Then Fletcher said, "49th and Hoover?" Then "Okay." Then he hung up.

Q. Immediately after that, did you have occasion to leave your home?

A. Yes, sir, I did.

Q. Did Mr. Fletcher also leave?

A. That is correct.

Q. Would you tell us about the circumstances?

A. Well, prior to leaving my home, I searched Mr. Fletcher and gave him \$700 of official advanced funds. He then entered his car and we followed him to the area or to the vicinity of 49th and Hoover. I was at that time accompanied by Officer Farrington in Farrington's car. [172]

When we got there, I got out of Farrington's vehicle and was on the street right there at the intersection of 49th and Hoover. Well, at approximately 1:30, I observed Rayson as he was driving southward on Hoover Street. At that time I was walking north on Hoover on the west side of the street.

(Testimony of Malcolm Richards.)

Q. Did you observe Mr. Fletcher on this occasion? A. Yes, sir.

Q. Would you state where he was?

A. At that time he was just leaving the intersection of 49th and Hoover.

Q. Yes. A. And entering into Hoover.

Q. Continue.

A. Well, I looked up and saw Rayson, and he saw me, and I continued walking toward 48th Street. At that time I rejoined Officer Farrington and we kept Fletcher under observation.

Fletcher drove to the vicinity of Figueroa and 50th Street, where he parked.

Q. Did you still have the defendant Rayson under observation at this time?

A. Well, at one time I observed Rayson as he drove down 49th Street, where he made a U-turn in the street, and due to his way of driving—I mean we discontinued.

Q. Did Mr. Fletcher stop on this occasion?

A. Yes, he stopped and parked.

Q. Did Mr. Rayson, the defendant Rayson, also stop at any time?

A. Yes, sir. He stopped and parked, and then he drove off again.

Q. What happened after that?

A. Well, we observed Fletcher as he left the area where he had been parked, and we followed him eventually to the vicinity of 55th and Budlong. At that time we observed Rayson's car as he was parked between 54th and 55th Streets. Fletcher

(Testimony of Malcolm Richards.)

double-parked right next to him, and they appeared to engage in conversation. Then Fletcher pulled away and parked in front of Rayson's car, at which time I saw Fletcher get out of Rayson's car.

Q. Pardon me?

A. At which time I saw Fletcher get out of his car and approach Rayson's.

Q. Yes.

A. Then they appeared to be engaged in further conversation, after which Rayson drove away and Fletcher re-entered his car, and we later met at my residence.

The Court: What was this date?

The Witness: This is September 22, sir.

Q. (By Mr. Jensen): Did you observe any further meetings between Fletcher and the defendant Rayson on that day? [174]

A. Yes, sir.

Q. When did that occur?

A. That occurred around 3:00 p.m.

Q. Between your return from this first meeting and the 3:00 p.m. meeting, were there any additional telephone calls?

A. No, sir, no one—my phone did not ring.

Q. Would you relate to us the circumstances of the 3:00 p.m. meeting?

A. After I returned to my residence, Fletcher and I had a conversation. Then I searched him and did not find any money on him.

Then at approximately 3:00 p.m., we left my house and we followed him to the vicinity of Main and Jefferson, where he parked his car. We then

(Testimony of Malcolm Richards.)

observed him meet defendant Rayson on the north-east corner of Jefferson and Main. They talked for about—approximately three to five minutes, after which Fletcher left Rayson and re-entered his car.

We then followed him back to my residence, where he turned over to me the \$700 which I had previously furnished to him that day.

Q. On that day, when did you first furnish him the \$700?

A. That was while we were at my home.

Q. Prior to the first meeting?

A. Prior to the first meeting at 49th and Hoover.

Q. You say you searched him after that first meeting and he no longer had the money on him?

A. That's right.

Q. Going back in your testimony to the time that you delivered the \$860, this was September 14, as I recall your testimony. Was any part of that money returned to you by Mr. Fletcher?

A. There were.

Q. When was that returned to you?

A. After the second meeting between Fletcher and Rayson, which was at 58th and Main.

Q. That would be a meeting that occurred about 1:00 or 1:30 in the afternoon?

A. Approximately 1:20, yes, sir.

Q. Did you search him at that time to determine whether or not he had the balance of the money?

A. I did.

Q. Did you find any additional money on him?

A. No, sir. He returned the \$160 to me. Then

(Testimony of Malcolm Richards.)

I searched him and he did not have any other money on him.

Mr. Jensen: I have no further questions.

Cross Examination

Q. (By Mr. Neblett): Mr. Richards, the Farrington that you mentioned, what is his position, if you know? [176]

A. He is a deputy sheriff with the Sheriff's Office of Los Angeles County.

Q. What does Landry do?

A. He is in charge, he is the sergeant in charge of his special squad.

Q. In what city?

A. Narcotics, deputy sheriff.

Q. Narcotics, deputy sheriff in Los Angeles County? A. That's right.

Q. He is not a federal officer?

A. No, sir.

Q. You told me about Farrington and Landry. Who are the others?

A. Stoups and Gillette. They also hold the same kind of position as Officer Farrington.

Q. Deputy sheriff?

A. That is correct, sir.

Q. Was anyone else among this group you have mentioned that you haven't told me about now? Those are all of them?

A. That is concerned with this case.

Q. You and Farrington and Landry, and what others? A. Stoups and Gillette.

(Testimony of Malcolm Richards.)

Q. Stoups and Gillette. When did you first meet Fletcher?

A. I met him—I did not actually meet him, but I knew [177] him in 1954.

Q. When did you first meet him? You said you knew him. How did you know him?

A. He was pointed out to me. He was pointed out to me and I saw him several times.

Q. He was what?

A. He was pointed out to me.

Q. By whom? A. By other people.

Q. Where? A. On Fifth Street.

Q. When did you first meet him? You must recall when you first met him.

A. The first time that I actually met him was in February 1955.

Q. What were the circumstances under which you met him in February 1955?

A. He was arrested by myself and the other officers who I work with.

Q. What officers were with you at that time, if you recall?

A. There were the same officers that I named previously, together with Agent Perry.

Q. Farrington, Landry, Stoups, and Gillette were all there at the time you arrested him? [178]

A. Stoups was not there at that time.

Q. What was he arrested for, if you recall?

A. Possession of narcotics.

Q. He was arrested here in Los Angeles County?

A. Right, sir.

(Testimony of Malcolm Richards.)

Q. What happened? Was he brought before the Commissioner, or do you know?

A. He was brought before the Commissioner.

Q. Did you testify?

A. No, sir, I did not testify.

Q. Did the Commissioner discharge him?

A. He did not. He placed him on his own recognizance.

Q. Was a hearing ever held before the Commissioner?
A. Not to my knowledge.

Q. Do you know how he disposed of that charge?

A. The case was continued by the Commissioner.

Q. And he was let out by the Commissioner on his o.r.? That means he was let out on his bond?

A. His own personal bond.

Q. His own personal recognizance, so to speak?

A. That's right.

Q. So far as you know, the case has never been disposed of, has it?

A. As far as I know, no, sir.

Q. Then after you had arrested him and he had been [179] brought before the Commissioner, when did you next see him?

A. I saw him that same day and the following day. I saw him practically every day since that time.

Q. What were you seeing him about after he had been brought before the Commissioner and released on his o.r.?
A. We had discussions.

Q. Instructions from whom?

A. I said discussions.

(Testimony of Malcolm Richards.)

Q. What were you discussing?

A. We were discussing the other narcotic peddlers from whom he had been previously dealing with and from whom he had been getting narcotics from.

Q. How did you happen to start talking to him about it at this time? Did you receive any instructions from higher up or others in authority above you to do so?

A. Yes. I discussed the case with my officer in charge, which is Agent Davis.

Q. Mr. Davis? A. Davis, yes, sir.

Q. Mr. Davis is chief of the Narcotics Bureau in Los Angeles, is he not? A. That's right.

Q. And what instructions did Mr. Davis give you about Fletcher?

A. Well, he told me to go ahead and see whether or not [180] Fletcher could aid us in any kind of way in trying to make cases on the persons from whom he had been getting narcotics.

Q. When did you first see the defendant Kelley?

A. When I first saw him?

Q. Yes.

A. That was in the early part of 1953.

Q. What were the circumstances of your seeing him in 1953, Kelley?

A. What were the circumstances?

Q. Yes. A. I saw him here in court.

Q. You saw him in court in 1953?

A. That's right.

(Testimony of Malcolm Richards.)

Q. You have known him ever since then by sight, have you?

A. Well, I knew him from before then.

Q. Were you one of the arresting officers who arrested Kelley in 1953?

A. No, sir. He was arrested in 1952, to the best of my knowledge.

Q. I guess that's right, yes. You then met him, you first saw him in 1953. You saw him in court in 1953?

A. Yes, sir.

Q. In what connection?

A. He was in Judge Yankwich's court at that time. [181]

Q. In 1953?

A. To the best of my recollection.

Q. Were you a witness at that time or do you recall?

A. No, sir, I was not a witness.

Q. You were just an observer?

A. That's right.

Q. You knew Kelley then or knew him by sight or knew who he was before you met Fletcher, didn't you?

A. Yes, sir, I did.

Q. Of course, you didn't meet Fletcher or get in contact with Fletcher until February 1954?

A. I did not say that, sir.

Q. What did you say?

A. I said in the early part of 1954, I have seen him.

Q. So you knew Kelley before you knew Fletcher by sight, knew who he was before you met Fletcher?

A. That's right.

(Testimony of Malcolm Richards.)

Q. Approximately nine months to a year prior?

A. Approximately that.

Q. Did you mention Kelley to Fletcher the first time that Kelley's name ever came up between you and Fletcher?

A. If I mentioned it?

Q. Did you mention it?

A. No, sir, I did not mention it.

Q. How did the name of Kelley first come up between you [182] and Fletcher?

A. Well, he asked—I mean we asked him who were all the persons that he had been dealing with, and he mentioned Kelley and Rayson and several others, and at that time we knew what the reputation of those people were at the time.

Q. And that was mentioned to you after Fletcher was arrested in 1955, wasn't it, when he first arrested by you in 1955?

A. Yes, sir.

Q. You don't remember the date, do you, when you arrested him in 1955?

A. Either the 17th or 18th of February.

Q. How long was it after that before you brought up the name—not you brought up, but the names of Kelley and Rayson were brought up between you and Fletcher?

A. Well, it was mentioned at the outset, at the outset, I mean, in other words, since after he was arrested and we got to talking, I mean his name was brought up.

Q. Do you remember any discussion with Fletcher in which you or any of the other officers said to him that if he would furnish you some

(Testimony of Malcolm Richards.)

names and information and facts on other persons dealing in narcotics, you would see that he got—you would help him to get rid of this proceedings which was then pending against him?

A. I did not mention any such thing, sir. [183]

Q. It never came up at all? It never came up at all between you and Fletcher?

Mr. Jensen: I object to that as being ambiguous, your Honor. I don't think either the witness nor the record would be clear if he answered as to what he means by "at all."

Mr. Neblett: I will withdraw the question.

Q. You heard Fletcher's testimony in which he said he was cooperating with the government?

A. That's right.

Q. What do you understand by cooperation?

A. In other words, it was a discussion between Fletcher and myself and Sergeant Landry and Mr. Davis, and we told him whatever he did in aiding us in trying to make cases against the persons from whom he had been receiving his narcotics, that anything that he did, that we would bring it to the attention of the United States Attorney, who in turn—I mean that we would bring it to the attention of the United States Attorney at the time that his case come up.

Q. Let's come back now, or go forward to August 22, 1955. That is the date that you have testified that you accompanied in another car or followed in another car Fletcher to the La Jolla Cleaners, 806 East Sixth Street, isn't that right?

(Testimony of Malcolm Richards.)

A. That's right, sir.

Q. Tell us what conversation was had between you and [184] the other officers, whatever other officers were present, and Fletcher, prior to your going down to 806 East Sixth Street?

A. Well, we asked Fletcher whether or not he thought that Kelley would still deal with him, and he said yes, that he had dealt previously with Kelley, and he had no reason to believe whether or not Kelley would not deal with him at that time, so we then told him, "Okay, let's go on down there and see what was happening with, you know, with Kelley."

Q. That suggestion was made by—you say "we." You were referring to yourself and Officer Farrington, and whom else? A. And Landry.

Q. Landry? A. That's right.

Q. The three of you? A. Yes, sir.

Q. You made the suggestion to him that to go and see whether or not Kelley would deal with him in narcotics?

A. Would still deal, I mean with him, because we had had information from other sources that, you know, that Kelley would——

Q. I didn't ask you that. I move to strike that.
The Court: It may go out.

Q. (By Mr. Neblett): I asked you whether or not you were the one that made the suggestion. When you say "we," [185] you were talking about yourself, Farrington and Landry, is that right?

A. That is correct, sir.

(Testimony of Malcolm Richards.)

Q. You three made this suggestion on the morning of the 22nd of August, 1955, that he, Fletcher, go down and see whether or not Kelley would deal with him in narcotics, is that right?

A. Fletcher brought it up, that he thinks he could do it, so we said, "Okay, go ahead."

Q. Didn't you just say a while ago that you made the suggestion? You said, "We made the suggestion."

A. I mean, in other words, we gave him permission to under our direction. In other words, Fletcher was working strictly under our direction.

Q. Didn't you say a while ago, "We suggested to him, Fletcher, that he go down and see whether or not Kelley would deal with him in narcotics or deal with him again," or something to that effect? Did you say that to him?

A. No, I didn't say that.

Q. What did you say a while ago?

A. I said Fletcher first brought it up and we said, "Okay, go ahead."

The Court: You mean to say the suggestion came from Fletcher?

The Witness: Yes, sir. [186]

Q. (By Mr. Neblett): What was Fletcher doing at your house that morning?

A. We were discussing various things, I mean getting information and all like that.

Q. You were discussing several cases, weren't you?

A. That's right.

Q. Or several persons?

A. That's right.

(Testimony of Malcolm Richards.)

Q. Did you have any persons in this list you gave him to look up?

A. If we had any persons?

Q. I will withdraw the question. What did you say, just exactly what did you say to Kelley, or what did any one of the officers, Farrington or Landry, say to him at this meeting at your house on the morning of August 22, 1955? Just what did you say?

Mr. Jensen: I object to this. I think counsel has misspoken himself. He said "say to Kelley."

Q. (By Mr. Neblett): What did you say to Fletcher? I will re-form the question.

What did you or any other officers—there were three officers present with Fletcher, isn't that right?

A. That's right.

Q. What did you and the other officers say to Fletcher just prior to your going down to 806 East Sixth Street? [187]

A. Well, Fletcher told us——

Q. No, what did you say?

A. What we said?

Q. What did Landry or Farrington say, or you, all of you, not what Fletcher said. What did you say?

A. All right. After Fletcher told us something——

Q. That isn't what I asked you. I asked you what you said. Can't you answer the question? It's plain, isn't it?

A. All right. I will give to you what it was.

(Testimony of Malcolm Richards.)

Q. All right. What did you say?

A. We said, "Okay. You go in your car and we will follow you down to that vicinity."

Q. So without anything else said by you, you just said, "Okay. We will get in the car and follow you." Is that right, sir?

A. Fletcher said something first.

Q. I didn't ask you that. You know what you have said. You said a while ago, didn't you, that Fletcher first brought up at your house that he would go down and see whether or not Kelley would still deal with him in narcotics. Didn't you say that?

A. That's right.

Q. What did you say in response? What did you say after that?

A. Well, we said, "Yes, go on ahead and see if he would [188] still deal with you, and we would follow you down and cover you, and then you meet us back here at our house, at my house, and we will discuss it and see what was said."

Q. Then you took off and followed Fletcher to Kelley's place of business, La Jolla Cleaners, is that right?

A. That's right.

Q. How far did you park from the La Jolla Cleaners?

A. Well, Officer Landry parked the car on Towne, that is, between Towne and the next street east, which is, I believe, Stanford. I got out of the car and walked eastward on Sixth Street, at which time I saw Fletcher and Kelley appeared to be in a conversation.

(Testimony of Malcolm Richards.)

I then walked back towards where the government car was parked, and I again looked into the window, which is a plain glass window, and I saw Kelley at that time seated at the window, apparently making a telephone call, because he had the phone up to his ear.

I then walked back to the government vehicle, where I joined the other officers, and shortly after that Fletcher left the establishment and proceeded east on Sixth Street and we followed him.

The Court: Now, just a minute. Have you memorized this story?

The Witness: Have I memorized it?

The Court: Yes, have you memorized what you are testifying to? [189]

The Witness: Sir, I am just trying to place myself at the place.

The Court: The reason I ask you that is this. I want the reporter to read the question you were supposed to answer. Evidently you are not paying any attention to the question or you have got a memorized story you are trying to give.

(Question read.)

The Court: Did that question ask what you did or where you walked? How far did you park.

The Witness: One block, sir.

The Court: I wish you would pay attention to the questions and answer them instead of wandering all over the country.

Q. (By Mr. Neblett): What did Fletcher say to you when he got back to your place?

(Testimony of Malcolm Richards.)

A. He told me what he had said to Kelley. Do you want the conversation?

Q. What did he tell you he said to Kelley?

A. He said, after he entered the cleaners, both he and Kelley said hello to each other, and he asked Kelley what was happening, and Kelley said that things were out of commission at that time but, however, last week, you know, yes, last week that there was a fellow from back East who had about 15 [190] ounces of stuff and that the guy wanted \$200 an ounce for it, or \$10,000, and that Kelley said that the fellow stated that he did not want to remain here in Los Angeles because he was hinty—that means skeptical.

Q. Is that all?

A. He also told, Fletcher also told me that Kelley asked him if he had seen Rayson, and that Fletcher stated no, he did not.

Q. At that time did Fletcher say anything to you about the fact that he had known Rayson for some time?

A. No, not at that particular time, you know. Fletcher had a—no, sir, he did not.

Q. Did he at any time tell you he had known Rayson for some time? A. Oh, yes, sir.

Q. You knew that Fletcher had a background of convictions for narcotics, did you not?

A. I did.

Q. You knew about his term he served in Folsom Penitentiary, did you not?

A. Yes, sir, he told me.

(Testimony of Malcolm Richards.)

Q. And the one in Louisiana in the federal penitentiary from Louisiana—I don't know what penitentiary he went to, but you knew he had a conviction in Louisiana in the federal court for narcotics? [191] A. Yes.

Q. And you knew he had one for receiving stolen property?

Mr. Jensen: I am going to object to that. I don't think it is permissible after a man has been pardoned from an offense to further bring it up as such.

The Court: Overruled. The question is, did he know it.

The Witness: Yesterday was the first time I knew it.

Q. (By Mr. Neblett): Did you see Fletcher in the meantime after August 22 and before September 13, 1955? A. I did.

Q. Did you see him nearly every day?

A. Every day, every other day.

Q. Was he at your house every day or nearly every day between September—between August 22 and September 13, 1955?

A. No, sir. We would meet him away from my house, too.

Q. Where did you meet him when you met away from the house?

A. Well, various other places.

Q. How do you operate? You don't operate out of the office here, except on occasion, do you?

(Testimony of Malcolm Richards.)

Mr. Jensen: I am going to object to that. It is immaterial and irrelevant.

The Court: This is cross examination. Evidently there is a defense of entrapment, although it doesn't show in any [192] plea or memorandum filed. From statement of counsel, that is one of the defenses, entrapment. Objection overruled.

Q. (By Mr. Neblett): Do you operate out of the office or mostly from your house and other places around town? A. Out of the office.

Q. And other places, too? A. Yes.

Q. So you met Fletcher on several occasions and had several conversations with him between August 22 and September 13, is that so?

A. That's right.

Q. Were the other officers present at these meetings? A. Yes, sir.

Q. Did you discuss Kelley and Rayson at these meetings? A. Yes, sir, we did.

Q. What did Fletcher report about him, if anything?

Mr. Jensen: I am going to object to this unless we know when and where and who was present at the time of the conversation. I don't think we can just have the conversation generally, your Honor.

The Court: All right. Try to designate the time of the conversations, who was present, and where they took place.

Q. (By Mr. Neblett): Tell us when the first conversation was, what date it was after August 22,

(Testimony of Malcolm Richards.)

1955, and before September 15, when you saw Fletcher. [193]

A. I can't pin down the exact date, you know.

Q. Let me ask you this way. Maybe I can help you on it. A. Yes.

Q. You did have reports from Fletcher from time to time between August 22 and September 15, 1955, did you not, on what was going on between him and Kelley, if anything? Did you hear anything about that? Did Fletcher make reports to you between August 22 and September 15, 1955, as to his progress in buying some stuff from Kelley and Rayson? A. Yes, sir, he did.

Q. How many times did he make those reports between August 22 and September 15?

A. About twice, I mean that I can recall.

Q. Do you remember where the first conversation was held when he made a report to you and the other officers?

A. I can't recall whether it was at my home or elsewhere on the street.

Q. Who was present when he made this report, the first one now?

A. Sergeant Landry and Farrington.

Q. What did Fletcher say?

A. Fletcher said that one time he was driving on 55th and Long Beach, at which time he observed Rayson standing on the corner, and that Rayson waved to him. However, he did not [194] stop.

Q. Was anything said about Kelley?

A. Not at that time, sir.

(Testimony of Malcolm Richards.)

Q. You had a second conversation or second report from Fletcher. Where was that held, if you recall?

A. It could be at my house or elsewhere.

Q. Who was present at that report?

A. Landry and Farrington and myself.

Q. And Fletcher, of course.

A. Yes, sir.

Q. What did Fletcher say, if anything, about Kelley at this meeting?

A. We asked him whether or not he had seen Rayson or Kelley at any time. He said no, he did not.

Q. Coming back to the meeting at your house on September 13, did you have a meeting at your house on September 13?

A. Yes, sir, there was.

Q. Was that the day you testified that Fletcher called on Kelley again at 806 East Sixth Street?

A. That's right, sir.

Q. What time of the day was that?

A. That was approximately 9:30 a.m.

Q. The other four officers that you mentioned were present with you at that meeting?

A. Yes, sir. [195]

Q. What did you say to Fletcher that morning about Kelley and Rayson, if anything?

A. Well, we told Fletcher that one of the officers had driven by Kelley's place of business and that he had been there, that he was there, and we

(Testimony of Malcolm Richards.)

then told him that he should try and go on down there and see what was going on.

At that time Fletcher had told—he had previously told us the way that Kelley operated, and I furnished him with my telephone number and told him that in case Kelley did ask him for a number, that he should furnish my home phone number.

Q. Then did you instruct Fletcher to go down and see Kelley? A. Yes, sir.

Q. He went down to see Kelley, did he not?

A. Yes, sir, he did.

Q. You and the other four officers followed him in one or two cars? A. Yes, sir.

Q. And what happened? Fletcher arrived at 806 East Sixth Street, the La Jolla Cleaners, and did he go inside? A. He did.

Q. Did you see him go inside? A. I did.

Q. Where were you parked at the time? [196]

A. My car was parked between Towne and Stanford.

Q. How far is that from the La Jolla Cleaners?

A. About a block.

Q. Is it around the corner?

A. No corners.

Q. Where did Fletcher park?

A. He parked directly in front of Kelley's cleaning establishment.

Q. Wasn't that the day that Kelley was on the street sweeping in front of the La Jolla Cleaners?

A. No, sir, it was not.

Q. Before Fletcher went down to see Kelley on

(Testimony of Malcolm Richards.)

this morning of September 12th. Did you wire him for sound? A. I did not, sir.

Q. Did anyone do it in your presence, or did you know he was wired for sound?

A. It was not in my presence.

Q. Did you know about it?

A. Yes, sir, I knew about it.

Q. Who did it?

A. Officer Farrington.

Q. What did this wire arrangement consist of?

A. It is called a Minikon or wire recorder.

Q. It sounds as a wire in the machine itself, is that correct? [187]

A. That's right, sir.

Q. It is not a transmitter, is it?

A. No, sir.

Q. He was fixed up with that before he left to go down to talk to Kelley on the morning of September 12, is that right?

A. I was told that.

Q. You were told that?

A. Yes, sir.

Q. By Officer Farrington?

A. That's right.

Q. Where did Officer Farrington put this attachment on him, in the house, or do you know?

A. No, sir. It was not at my house.

Q. He came in already wired, did he?

A. No, sir. Officer Farrington and Fletcher went to Farrington's home while I remained in the vicinity of Kelley's chambers.

(Testimony of Malcolm Richards.)

Q. When Fletcher came to your house on the morning of September 13, he already had the attachment on him, did he?

A. No, sir, he did not.

Q. Then after you had said to each other he was going down to see Kelley at La Jolla Cleaners that morning, after that was discussed and arranged, did Farrington take him out and wire him and then bring him back? [198]

A. We drove to the vicinity of Kelley's cleaners, and while I remained there, I saw Kelley in his cleaners at that time, Fletcher and Farrington drove away while I remained in the area of Kelley's cleaners.

Q. How long were they gone?

A. I would say about 15 minutes, 15 or 20 minutes—well, 15 minutes.

Q. How far is Officer Farrington's home from the La Jolla Cleaners?

A. About 16 blocks away.

Q. Then when Fletcher came back, he parked in front of La Jolla Cleaners and went in, is that correct?

A. That's right, sir.

Q. How far did the other officers park away from the La Jolla Cleaners?

A. Well, Officers Farrington and Gillette were out of my view at the time. I could not tell you how far away they were parked.

Q. You couldn't tell, you didn't see them?

A. No, sir.

Q. Was some other officer with you?

(Testimony of Malcolm Richards.)

A. Sergeant Landry was with me.

Q. What did Fletcher do when he arrived?

A. He got out of his car and entered the place.

Q. How long was he in there? [199]

A. About five minutes.

Q. Did you walk by the door that morning?

A. I did.

Q. You are sure this is not the day Kelley was outside on the street sweeping the street in front of the building, are you sure of that?

A. I am positive it is not the same day.

Q. What was done with that wire recording of that conversation, if you know?

A. Well, Officer Farrington turned it over to Sergeant Landry down at the Sheriff's Office.

Q. And that's all you know?

A. That's all I know about it.

Q. On the 14th, you had a conversation with Fletcher on the 14th, did you not?

A. I did.

Q. At your house? A. That's right, sir.

Q. And the other officers were there, the other four?

A. No, sir. There was just Officer Farrington and myself.

Q. Fletcher had reported to you the day before, had he not, as to what the conversation was between him and Kelley?

A. Yes, sir, he did.

Q. What did Fletcher say? [200]

A. Fletcher said when he went into the cleaners,

(Testimony of Malcolm Richards.)

he and Kelley exchanged greetings together. Then Fletcher—no, Kelley asked Fletcher whether or not he had seen Rayson, and that Kelley went on to state that Rayson had told him that he had seen Fletcher on the street some place and had waved to him, but Fletcher never did stop.

Fletcher said he told Mr. Kelley the reason he didn't stop was because at that time he did not want to do any business with Rayson out there in the open. Then Fletcher told me that he gave Kelley the telephone number which I had previously given to him, and that Kelley told him that he would not be able to get in touch with Rayson so he could meet him that morning, but that the best time would have to be some time the following day.

Fletcher also stated he told Mr. Kelley that the best time to catch him would be at this particular number he had given to Kelley, on the next morning between the hours of 8:00 and 10:30.

Q. This number was your unlisted number, was it not? A. That's right, sir.

Q. Did you give that unlisted number to Fletcher with instructions to give it to Kelley and Rayson, so that Fletcher could be called at your place?

A. I gave it to him, sir.

The Court: For that purpose? [201]

The Witness: Yes, sir.

Q. (By Mr. Neblett): What conversation did you have with Fletcher when you gave him the number?

A. Well, Fletcher told me that was the way

(Testimony of Malcolm Richards.)

Kelley operated. Each time he had business dealings with him he would have to give him a telephone number.

Mr. Neblett: Your Honor, I will move——

Q. Well, go ahead with your conversation that you had with Fletcher at the time you gave him the telephone number.

A. How far did I get?

(Record read.)

A. And then someone would call Fletcher either the same day or the day after.

So I told him, well, then, he could give him my phone number, and that is what I did.

Mr. Neblett: If your Honor please, I notice it is noon and I am not quite finished with this witness.

The Court: I have been wondering how we are going to get along. I have another case scheduled in the morning. This is the second government witness. I don't know how much longer your cross examination is going to last.

Mr. Neblett: I am not going to be very long with him, your Honor. I would say maybe 30 minutes. I have had him now for about 30 minutes.

The Court: I understand. [202]

Mr. Jensen: I think I can cut down mine, your Honor.

The Court: You have got the chemist to testify.

Mr. Jensen: Yes.

The Court: And these other officers would be more or less cumulative.

Mr. Jensen: I think probably everybody will

(Testimony of Malcolm Richards.)

want to hear from Farrington. I would like to put him on.

The Court: Who?

Mr. Jensen: Officer Farrington. Not on things that are cumulative. I won't cover everything with him. I think I could hold him down to 30 minutes, and say 15 or 20 minutes for the chemist.

The Court: I think we better come back at 1:30. Will that inconvenience you?

Mr. Neblett: That is perfectly all right.

The Court: We will recess until 1:30 this afternoon. [203]

Wednesday, November 30, 1955, 1:30 p.m.

The Court: You may proceed.

MALCOLM RICHARDS

the witness on the stand at the time of the recess, having been previously duly sworn, was examined and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Neblett): Mr. Richards, you testified that you gave Mr. Kelley \$860 on the morning of the 14th, and that he took that \$860 out but brought it back, is that correct, on the second trip that morning—or the first trip? Which was it?

A. Well, the first time he met Rayson, that Fletcher met Rayson, I had given him \$860. However, when he came back to my house, I had gotten it back from him.

(Testimony of Malcolm Richards.)

Q. Then you had a telephone call, a telephone call came in to your number. Was that before you went out to meet Rayson, or in order to meet Rayson you had a telephone call from someone? The first time that Fletcher said that he was going out to meet Rayson, you had a telephone call at your house prior to that time, or a telephone call came in to your house to Fletcher, is that right?

A. That is correct, sir. [204]

Q. As I understood you to say, you didn't listen in on that call, but Mr. Farrington did.

A. That's right, sir.

Q. How did he listen in on the call? Was Fletcher listening in at the same time? How did they work it?

A. Well, Fletcher had the receiver to his ear, and Farrington also stood very close to Fletcher, and both of them listened in on the same—you know, in the same part.

Q. They stood cheek to cheek, is that it?

A. I mean close together.

Q. What was said in this conversation, or what was reported to you as having been said in this conversation that prompted you to give Fletcher the \$860?

A. You want me to recite what I heard that Fletcher said?

Q. Yes, what you heard there. You gave him \$860, but you must have heard something at that time that prompted you to give him the \$860.

(Testimony of Malcolm Richards.)

A. Fletcher told me what the other man at the other end of the phone had told him.

Q. What did Fletcher tell you?

A. He told me that he was supposed to go to meet him at a certain place, which is at 58th and Hoover.

Q. Was he supposed to go and pick up some heroin at that time? [205]

A. Whether or not he was going to get the heroin at that——

Q. What was said? Did he say he was going to get the heroin, or was he just going out and give this man \$860?

A. He said he was just going to meet and talk to him. No mention of money was made at that time.

Q. So you gave him \$860 with no mention of what was to be done with it?

A. That is correct.

Q. Then you got there first, didn't you, at 58th and Hoover?

A. No, sir. We didn't get there first. Fletcher arrived at his location first.

Q. Then you came in later?

A. Well, when he was parked, Farrington and myself was also about a block away. Then I got out of the car and walked.

Q. How close were you to Fletcher's car?

A. Well, on one occasion I just passed by him as he was parked at the curb. I just walked by him.

Q. Was the defendant Rayson there at that time?

(Testimony of Malcolm Richards.)

A. Not at that particular time, sir.

Q. When you saw somebody that you believe to be Rayson show up, you were back at your car where it was parked?

A. No, sir, I was not.

Q. Where were you? [206]

A. I was standing up on a loading platform which is located between 58th Street and Slauson Boulevard right next to the railroad tracks.

Q. Were you on the same side of the street as Fletcher? A. I was, sir.

Q. How far were you away?

A. I would say about a hundred feet.

Q. You said the defendant Rayson came and talked to Fletcher?

A. Not at that particular time, sir.

Q. Did he show up at all, then?

A. Yes, sir, he did.

Q. When did he show up?

A. Well, he showed up at approximately 10:45.

Q. Where? Did Fletcher remain parked at the same place?

A. Fletcher was parked between 57th and 58th Street.

Q. Yes.

A. And Rayson pulled right in front of him about two or three car lengths, and then Fletcher started up his vehicle and started to follow Rayson, who in the meantime had pulled out in front of Fletcher.

(Testimony of Malcolm Richards.)

Q. Where did Rayson and Fletcher go from there?

A. Well, they turned right on 57th Street, heading east. [207]

Q. How far did they go?

A. They went towards the middle of the block.

Q. And stopped? A. That's right.

Q. What did you observe then after they stopped?

A. I observed Rayson get out of his car and walk back to Fletcher's car and enter.

Q. You didn't hear any part of the conversation? A. No, sir, I couldn't.

Q. Do you know whether or not Fletcher had on the recording machine at that time?

A. He did not, sir.

Q. After that, afterwards Rayson got out of Fletcher's car and left?

A. Re-entered his car and left.

Q. What did you and Fletcher do?

A. Well, Fletcher made a U-turn in the street and passed by Officer Farrington and myself, and Rayson proceeded eastward on 57th Street.

Q. Back to your house? Did he go back to your house? A. Which one?

Q. I mean did Fletcher go back to your house?

A. He went back to my house.

Q. Did he return the \$860 then?

A. He did, sir. [208]

Q. Coming back to later that day, you had another conversation, or Fletcher had another con-

(Testimony of Malcolm Richards.)

versation over the telephone with someone, is that right? A. That is correct, sir.

Q. Who listened in on that conversation?

A. Farrington.

Q. Who? A. Officer Farrington.

Q. Farrington did all the listening in on the telephone? You didn't do any of it, did you?

A. I did not, sir.

Q. At any time?

A. Later during the day.

Q. Later in the day? A. At 6:35 p.m.

Q. Now we will proceed. You heard the telephone conversation from Fletcher's end when this call came in? A. I did, sir.

Q. Do you remember the time of the day?

A. It was exactly 11:57, because I wrote it down.

Q. After that conversation you had a report from Fletcher and Farrington as to what was said, and you gave Fletcher the \$860 back, did you not?

A. Not at that time, sir.

Q. When? [209]

A. After he received and finished another telephone conversation.

Q. Tell us the conversation when you gave him the \$860 back. What conversation did that follow?

A. It followed the first conversation which Fletcher had with this other person at approximately 12:04 p.m.

Q. That is another conversation now?

A. Yes.

Q. Another telephone conversation at 12:04?

(Testimony of Malcolm Richards.)

A. That's right.

Q. Then after that conversation, after Fletcher reported to you and Farrington reported to you as to what the conversation consisted of, you returned to Fletcher the \$860?

A. I did, sir.

Q. Then all of you started for a rendezvous, a meeting some place?

A. That is correct, sir.

Q. Where was this meeting held this time?

A. 57th between Main and Broadway.

Q. And did you observe Rayson at that meeting?

A. I did, sir.

Q. Tell us what happened.

A. Well, as Officer Farrington and myself parked Farrington's car, I observed Fletcher as he was parked on the [210] north side of the street, on 57th, but closer towards Main. Then we saw, at least I saw Rayson walk across the street from his car and stood up right next to the driver's side of Fletcher's car.

Q. He didn't get in the car, did he?

A. No, sir. He stood right next to it.

Q. Could you tell whether or not the window was open in Fletcher's car?

A. I couldn't see whether or not the window was open.

Q. He was on the left-hand side of the car, on the driver's side, was he not, Rayson?

A. That's right.

Q. Did you hear any conversation that took place between the two at that time?

(Testimony of Malcolm Richards.)

A. No, sir, I did not.

Q. How far were you away?

A. I would say about a hundred yards or so.

Q. A hundred yards away?

A. That's right.

Q. 300 feet this time? A. Yes, sir.

Q. How long did this meeting between Rayson and Fletcher last?

A. I would say between three and four minutes.

Q. Did you see any money pass between the two at that [211] time?

A. I myself did not.

Q. You didn't see anything pass between the two? A. No, sir.

Q. When you all left and Rayson left, and then Fletcher left, you all reconvened at your house?

A. That is correct, sir.

Q. Did Fletcher say he had given out any of that money? A. He did.

Q. How much did he say he had given?

A. He said he had given Rayson \$700.

Q. What did he say he had given it to him for? For what purpose did he say he had given it to him? A. For the two ounces of heroin.

Q. The purchase of heroin?

A. That is correct, sir.

Q. Did he purchase any heroin at that time, or do you know?

Mr. Jensen: I object to that as being a conclusion of law, calling for a conclusion of law.

The Court: Overruled.

(Testimony of Malcolm Richards.)

Q. (By Mr. Neblett): Go ahead. Did Rayson receive the money and did Fletcher purchase any heroin from Rayson at that time, if you know?

A. At that time, no, sir. I don't know. [212]

Q. How do you know that? Because Fletcher told you that?

A. When Fletcher returned—could I explain?

Q. Yes, go ahead and we will see.

A. When Fletcher returned to my home, he gave me \$160 and told me that he had given the \$700 to Rayson. I then searched Fletcher's person and there was no other money or narcotics on him.

Q. Did you search Fletcher's car to see whether the \$700 was in there?

A. I did not, sir.

Q. Did anyone else, to your knowledge, search his car?

A. Not to my knowledge.

Q. All you know then about the \$700 as having been given to Rayson is Fletcher's word that he did?

A. That's right.

Q. You didn't see it pass, did you?

A. I did not see it actually pass, sir.

Q. Was Fletcher in your view all the time from the time that he left Rayson at this rendezvous we have just discussed until he arrived at your home?

A. He was, sir.

Q. You kept him constantly under observation?

A. Correct, sir.

Q. But you didn't look into his car at all, did you? [213]

A. I did not look into his car.

(Testimony of Malcolm Richards.)

Q. So far as you know, no one else did?

A. As far as I know, no.

Q. Did Fletcher come back with any heroin.

Did he come back from this meeting with any heroin? A. No, sir.

Q. What did he say to you about paying the money and not getting the stuff, so to speak? You understand what I mean by the stuff, do you not?

A. I do.

Q. What did he say about that?

A. He said that he had paid the \$700 to Rayson and that Rayson had told him that he would call him at my house at 6:30 p.m., at which time he would tell him where the stuff was or meet him and give him the stuff.

Q. Did you tell Fletcher that was all right and for him to give up \$700 of this money without the stuff having been delivered? A. I did.

Q. You told him that was all right, did you?

A. I did.

Q. About 6:30, did you receive another call?

A. The phone rang at my house at 6:35 p.m.

Q. Did you listen in on this conversation?

A. I did. [214]

Q. What was said by the person—well, I guess the person called and Fletcher answered and said hello? A. Yes, sir, he did.

Q. Then what was said by the person calling?

A. "Are you ready?" Do you want me to go ahead?

Q. Yes.

(Testimony of Malcolm Richards.)

A. This male voice said, "Are you ready?"
Fletcher said, "Yes."

Then this person continued to state, "Go to 58th and Budlong and look right at the bottom of a railroad sign, a R. and R. sign, and the stuff would be right there, and it was under—it was in a brown paper bag right under another bottle in another brown paper bag."

Q. Did the voice talking on the other end of the phone say when it was put there, when the stuff was put there?

A. No, sir, he didn't say that.

Q. How long had it been since you had seen Rayson on the street with Fletcher earlier? You had seen him that afternoon earlier. What time was that?

A. That was the time he delivered over the money to Rayson.

Q. How much time elapsed between that and the time this telephone call came to Fletcher at your house in the afternoon saying the stuff is on the railroad sign?

A. I would say about six hours. [215]

Q. These telephone conversations you have described, were they recorded on any recording machine?

A. Yes, sir, they were.

Q. All of them?

A. The conversations on that date, yes, sir.

Q. You testified to one conversation that took place early in the morning.

A. That is correct.

(Testimony of Malcolm Richards.)

Q. Was that recorded? A. Yes, sir.

Mr. Jensen: I am a little confused. Are we talking of person-to-person conversations or telephone conversations?

Mr. Neblett: I am talking about telephone conversations only.

Mr. Jensen: All right.

Q. (By Mr. Neblett): There was a second telephone conversation, I believe you said, at 11:57, wasn't there? A. That's right, sir.

Q. Was that recorded? A. It was.

Q. And then there was another telephone conversation, I believe you said, at 12:20, wasn't it?

A. 12:04.

Q. Was that recorded? A. Yes, sir. [216]

Q. Then there was a fourth conversation in the evening about 6:30, 6:50, something like that?

A. 6:35.

Q. And was that recorded? A. Yes, sir.

Q. What kind of recording device did you have?

A. It is a regular recording machine, you know, on tape.

Q. Did you attach it to the telephone? You had a telephone attachment, didn't you?

A. Yes, sir. There was some clamp that was attached to the receiver and then it was recorded.

Q. The clamp was attached to the wire or clamp attached to the receiver? A. That's right.

Q. Did that block the receiver out so that the person couldn't listen to it?

A. It did not.

(Testimony of Malcolm Richards.)

Q. That was not a speaker, just a wire recorder?

A. It was just one wire that led from the speaker into the recording machine.

Q. Was that wire or tape or was it a record recorder? Which was it? You know a record, a celluloid record, and some of them are on wire and some are on tape? Which was this?

A. This one was tape. [217]

Q. Tape? A. That's right.

Q. Did you set it up, or who set it up?

A. I did not set it up.

Q. Who set it up?

A. Officer Farrington did.

Q. You don't know where it came from, do you?

A. I believe it came from the Sheriff's Office.

Q. You mean the Sheriff of Los Angeles County? A. That's right, sir.

Q. Do you know where that tape recording is now, the actual tape? A. Yes, sir, I do.

Q. Who went away with it?

A. Who went away with it?

Q. Who took it away from your place, these various tape recordings?

A. Sergeant Landry did.

Q. There were other telephone conversations? Were there any other telephone conversations at all except the ones you have testified to now happening on the 14th of September? Those were all?

A. That's right.

Q. Those four? A. That's correct. [218]

Q. After you got the fourth and last call on the

(Testimony of Malcolm Richards.)

14th—I say you, I mean the group, but the call, of course, came to Fletcher, didn't it?

A. That's right.

Q. Then you went down to Budlong and Slau-
son, did you not? A. I did.

Q. You related that this morning, as to what
took place. A. Correct, sir.

Q. Did you have Fletcher with you all day on
the 14th?

A. For a period—let's see. For a period of from
the time in which he left his home and went to pick
up his girl friend.

Q. What time did he leave—I don't quite get
you. He went to pick up his girl friend. When was
that?

A. Around from 4:30 to about 5:30 p.m.

Q. After he had gotten back from the meeting
with Rayson, why, he told you and the other of-
ficers assembled he had given Rayson \$700. Then
you released him to go and pick up—I say released
him, I don't mean by that you had him under ar-
rest, or anything of that sort, but you excused him,
let's put it that way, you excused him and he went
out to pick up his girl friend?

A. He was with us until about 3:00 p.m. over
at my [219] home, and then he left my house and
went over to his house, and after he left his house,
he went to meet his girl friend.

Q. He left for his house about 3:00 p.m., is that
right? A. That's right.

Q. And you didn't see him again until when?

(Testimony of Malcolm Richards.)

A. Well, we followed him over to his house.

Q. Well, you didn't follow him from his house to pick up his girl friend? A. No, sir.

Q. How long was he gone from his house to pick up his girl friend?

A. I would say about an hour and a half.

Q. How far is it from your house, or how far is it from Fletcher's house to Budlong and Slauson?

A. I would say about approximately three miles, three and a half miles.

Q. How far is it from Budlong and Slauson to your house? A. How far?

Q. Yes. A. About two blocks.

Q. Two blocks?

A. About two and a half blocks.

Q. Where is Fletcher's house that you spoke of a moment ago? Do you know the address? [220]

A. It was located on Fairfax near Jefferson.

Q. I am speaking of the house he was in at that time. It doesn't matter whether he is there now or not, but the house he was living in then was near Jefferson and what? A. Fairfax.

Q. Fairfax. It's about three miles from there to Budlong and Slauson?

A. Yes, I estimated it at that.

Q. A drive of 10 minutes, about?

A. It depends on traffic.

Q. Well, even with heavy traffic it is not over 20 minutes, is it? A. No, sir.

Q. Did you leave Fletcher's house when you followed him over to his house prior to the time he

(Testimony of Malcolm Richards.)

left it to go to Beverly Hills to pick up his girl friend, as he told you he was going to do?

A. If I followed him——

Q. No. You followed him from your house.

A. To his house.

Q. To his house. A. Right.

Q. That is about three miles, isn't it?

A. Approximately.

Q. You are getting out toward Beverly Hills, aren't you? [221]

A. That is way out west.

Q. When you got to Fletcher's house, did you get out and go in? A. No, sir.

Q. Did he get out and go in? A. He did.

Q. What did you do then?

A. Well, I and Officer Farrington stayed in the neighborhood.

Q. What do you mean by that?

A. Well, we parked outside and waited.

Q. For him to come back from Beverly Hills?

A. No, sir, for him to leave his house.

Q. How long was he in his house before he left?

A. I would say about an hour and a half.

Q. In his house before he left?

A. Right.

Q. Do you know whether he had a telephone in his house? A. Yes, he had a telephone there.

Q. He did have a telephone? A. Yes, sir.

Q. You know that of your own knowledge, do you not? A. Yes, sir.

Q. He did have a telephone.

(Testimony of Malcolm Richards.)

A. Yes, sir, I do. [222]

Q. Do you remember the number of it?

A. Yes, I do.

Q. What is it or what was it at that time?

A. Wyoming 7725.

Q. He went into the house at about what time when you and Officer Farrington accompanied him from your house to Fletcher's house, what time was it when Fletcher went in his house?

A. He got there approximately 3:30 or thereabouts.

Q. And then he parked outside or he went into a garage, or what did he do?

A. He went into a garage.

Q. You didn't go in the house at all?

A. No, sir.

Q. Did Officer Farrington go into the house?

A. No, sir.

Q. You said you remained in the neighborhood. Did you tell Fletcher you were going to remain in the neighborhood? A. I did.

Q. How far did you go from the house? You must have parked, didn't you? A. I did.

Q. How far from his house?

A. Just across the street.

In other words, there was an alley there and I parked in [223] the alley.

Q. How long was it you stayed there before Fletcher left?

A. About an hour, approximately an hour, thereabouts.

(Testimony of Malcolm Richards.)

Q. Do you know whether or not he telephoned anyone while he was there?

A. No, sir, I can't.

Q. You don't know what he did when he was in the house, do you?

A. No, sir, I don't.

Q. You didn't enter the house at all yourself?

A. Right.

Q. Is there a fence around the front yard of his house?

A. It is an open front yard.

Q. No fence?

A. No, sir.

Q. You didn't go on the yard even at all, you didn't go on the premises at all, did you?

A. No, sir.

Q. Did Farrington go on the premises at all?

A. He did not.

Q. No other officers were with you?

A. We were later joined by Sergeant Landry.

Q. You were what?

A. We were later joined by Sergeant Landry and Gillette, [224] Officer Gillette.

Q. They were with you?

A. They came up there later.

Q. What do you mean? Did they come up?

A. They got there about 4:30 or thereabouts.

Q. What time did you get there, you said?

A. Around 3:30.

Q. And when Sergeant Landry and—what is the other one's name?

A. Gillette.

Q. When Sergeant Landry and Gillette arrived,

(Testimony of Malcolm Richards.)

Fletcher was still in the house? A. He was.

Q. He left the house about what time?

A. I would say around a quarter to 5:00 or thereabouts.

Q. You say you arrived about 3:30 and you remained in the neighborhood parked across the street, you did, and finally Sergeant Landry and Officer Gillette showed up and you stayed there, and Fletcher came out of the house about 4:45, is that right? A. Between 4:45 and 4:30.

Q. I mean approximately 4:45.

A. Yes, approximately.

Q. And he drove off, didn't he?

A. We talked to him. [225]

Q. What did you say to him?

A. He told us he was going to pick up his girl friend or something, so we told him okay, but be back at my house around 6:00 o'clock.

Q. To be at your house around 6:00 o'clock, and that was an hour and a quarter away, wasn't it?

A. That's right.

Q. Did he tell you where he was going, to Beverly Hills or to something of that sort?

A. It is on Beverly Boulevard, if I recall.

Q. He did not give you the address, did he?

A. No, sir.

Q. When he left, what did you do?

A. Well, I and the other officers drove back to the vicinity of Main and Jefferson Streets, where we took up observation of the car of Rayson.

Q. Was Rayson's car there? A. It was.

(Testimony of Malcolm Richards.)

Q. Parked there?

A. It was parked in front of his place.

Q. Did you see Rayson?

A. No, sir, I did not see him.

Q. Did the car remain parked there all this time, his car?

A. Well, at the time that we arrived there, we saw his [226] car parked almost directly in front of his place of business, which is a recreation parlor.

Q. He did have a place of business, didn't he?

A. A recreation parlor.

Q. How long did the car remain there?

A. Well, we got there around 5:00 or thereabouts, and the car was there at the time, so Officer Farrington and myself drove to the north side of the establishment, and by the time we got back to Main Street, his car was gone. However, we did not see the other officers, who were Sergeant Landry and Gillette.

Q. So far as you know, the car was gone about around 5:00 o'clock or in that neighborhood, say?

A. Around that time.

Q. Then from there you went back to your house?

A. No, sir, we did not go directly back to my house.

Q. Where did you go?

A. We made a telephone call and contacted Sergeant Landry and the other officer, and we later met in the vicinity of Figueroa and 49th Street.

Q. What was your purpose in going there?

(Testimony of Malcolm Richards.)

Fletcher was still in the house? A. He was.

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A. We talked to him. [225]

Q. What did you say to him?

A. He told us he was going to pick up his girl friend or something, so we told him okay, but be back at my house around 6:00 o'clock.

Q. To be at your house around 6:00 o'clock, and that was an hour and a quarter away, wasn't it?

A. That's right.

Q. Did he tell you where he was going, to Beverly Hills or to something of that sort?

A. It is on Beverly Boulevard, if I recall.

Q. He did not give you the address, did he?

A. No, sir.

Q. When he left, what did you do?

A. Well, I and the other officers drove back to the vicinity of Main and Jefferson Streets, where we took up observation of the car of Rayson.

Q. Was Rayson's car there? A. It was.

(Testimony of Malcolm Richards.)

Q. Parked there?

A. It was parked in front of his place.

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Q. So far as you know, the car was gone about around 5:00 o'clock or in that neighborhood, say?

A. Around that time.

Q. Then from there you went back to your house?

A. No, sir, we did not go directly back to my house.

Q. Where did you go?

A. We made a telephone call and contacted Sergeant Landry and the other officer, and we later met in the vicinity of Figueroa and 49th Street.

Q. What was your purpose in going there?

(Testimony of Malcolm Richards.)

A. To discuss matters.

Q. Other cases?

A. No, sir, this case, this same case.

Q. 49th and Figueroa? [227]

A. Yes, sir. It was on Figueroa, I think. It is either 49th or 50th Street.

Q. Why did you pick out that location?

A. Because the radio told us Sergeant Landry would meet us in that vicinity. It is just that we picked that area.

Q. How long did you stay at 49th and Figueroa or in that vicinity?

A. I would say we stayed there about five or ten minutes.

Q. What did you do then?

A. Then Landry and myself—no, not Landry. Farrington and myself then returned to my home.

Q. Where did Landry and the others go?

A. I don't know.

Q. What time did you arrive at your home?

A. I got there around 10 minutes to 6:00.

Q. What?

A. Around 10 minutes to 6:00 or thereabouts.

Q. You left at 3:30 to accompany Fletcher to his home, which is out in the neighborhood of—that's Fairfax and Jefferson, isn't it? Isn't that what you said?

A. Yes, sir.

Q. Then you arrived back at your home about 5:40. You were gone from 3:30 to 5:40 from your house. [228]

(Testimony of Malcolm Richards.)

A. Yes, approximately, until 10 minutes to 6:00 or thereabouts.

Q. All right. Was Fletcher at your home when you arrived?

A. No, sir, he was not.

Q. What time did he show up?

A. Around 6:00 o'clock or about five after 6:00.

Q. Do you have any knowledge of where he went other than what he told you, when he was gone for this period of about two hours and a half?

A. No, sir, I don't.

Q. You only know what he told you about it, that he was gone to pick up his girl friend?

A. That's right.

Mr. Neblett: That's all.

Redirect Examination

Q. (By Mr. Jensen): Was he gone two hours and a half or was the question misleading?

A. He was gone from about a quarter of 5:00 until the time he came to my house.

Q. That would be an hour and 15 minutes then?

A. That's right.

Q. Mr. Richards, have you at any time ever made any [229] promises or agreements with Mr. Fletcher about not prosecuting him or not presenting any evidence against him, or anything of that nature, other than making a statement to him that you would advise the United States Attorney's office as to his activities in aiding us in the investigation of this type of cases?

(Testimony of Malcolm Richards.)

Mr. Neblett: If your Honor please, we object to that question on the ground it is incompetent, irrelevant and immaterial, and the promise would be illegal if he made it, because he had no authority to make any such promise in the first place.

The Court: Sustained.

Mr. Jensen: I don't believe I have any further questions.

The Court: Step down.

(Witness excused.)

Mr. Jensen: Officer Farrington, will you come forward, please?

WILLIAM R. FARRINGTON

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand, please, and state your name.

The Witness: William R. Farrington.

Direct Examination

Q. (By Mr. Jensen): You are a resident of Los Angeles County, are you [230] not?

A. Yes, sir, I am.

Q. You are presently employed by the County of Los Angeles, are you not? A. I am.

Q. How long have you been so employed?

A. Approximately three and a half years.

Q. In what capacity are you employed by the County of Los Angeles?

(Testimony of William R. Farrington.)

A. Deputy Sheriff, assigned to the Narcotics Division.

Q. Is that a fairly large squad, the narcotics detail?

A. Approximately 32 men in the Sheriff's office.

Q. Approximately 32 men. Is Sergeant Landry another member of that squad?

A. He is.

Q. Do you work with him?

A. Yes. He is the officer in charge.

Q. And also with Federal Agent Richards, who just left the stand?

A. Yes, sir.

Q. Are you acquainted with the defendants Kelley and Rayson?

A. Yes, sir, I am.

Q. What was the first occasion that you became acquainted with the defendant Kelley, where, the time? [231]

A. The first occasion I became acquainted with him was at the time of his arrest, Sergeant Landry and myself.

Q. Don't refer to the incident. Give me the date, as nearly as you can remember.

A. As I recall, it was October 8 of this year.

Q. Is that the first contact you had with the defendant Kelley?

A. That is the first personal contact I have had with the defendant.

Q. Had you seen him prior to that?

A. Yes, sir, I had.

Q. What was the first occasion that you ever saw him that you recall?

(Testimony of William R. Farrington.)

A. It was approximately three years ago at the time that I joined the narcotics detail.

Q. Would that be some time in 1952?

A. No. It was 1953.

Q. 1953?

A. 1953, as I recall, yes, sir.

Q. Was he pointed out and identified to you at that time? A. He was.

Q. Would you state whether or not you have seen him off and on during the intervening period of time? A. Yes, sir, I have. [232]

Q. When was the first time that you observed the defendant Rayson, saw him, had him pointed out to you, the date?

A. In January, as I recall, some time in January or February of 1955, as I recall, the first part of this year.

Q. Have you had occasion to see the defendant Rayson on other occasions since that time?

A. Yes, sir, I have.

Q. Have you ever had occasion to have a telephone conversation with him?

A. No, sir, I have not.

Q. Have you ever heard him speak?

A. Yes, sir, I have.

Q. On more than one occasion?

A. Yes, sir, I have.

Q. Would you state whether or not he has a distinctive voice? A. I would say so.

Mr. Neblett: Excuse me, your Honor.

Mr. Jensen: It is preliminary.

(Testimony of William R. Farrington.)

Mr. Neblett: I object on the ground it calls for a conclusion.

The Court: It is a conclusion, but how do you recognize voices? They don't all sound the same.

Mr. Neblett: No, your Honor, that is true.

The Court: Sometimes they have a brogue, an accent. [233] Some people born south of the Mason and Dixon line never do learn to talk.

Mr. Neblett: I am afraid your Honor is referring to me.

The Court: Well, we all have peculiar accents. I have a peculiar accent, a peculiar twang. Overruled. I was born south of the Mason-Dixon line.

Mr. Neblett: Yes, I know where the court was born. If I may be pardoned for digressing, your Honor, I believe I could have recognized it from your voice if I hadn't already known.

Q. (By Mr. Jensen): Mr. Farrington, will you describe the voice or method of speech or any of the distinctive qualities that you heard?

A. The defendant has a—it isn't a harsh voice. It is a muffled type voice and his words are, you might say, garbled at times.

Q. Would you say whether it is high, low, or medium?

A. It is a low voice, rather low.

Q. Now, calling your attention to September 14, 1955, at the time of approximately 10:00 a.m. in the morning, I will ask you whether or not at that time on that date you were in Mr. Richards' home here in Los Angeles County.

(Testimony of William R. Farrington.)

A. Yes, sir, I was.

Q. Did a telephone conversation come in at that time?

A. A telephone conversation was. [234]

Q. Did you take the call?

A. No, sir, I did not.

Q. Did you listen to the call? A. I did.

Q. Would you state whether or not you recognized the voice you heard coming in on the telephone call from the other end?

A. Yes, sir, I did.

Q. Will you state to the court what voice that was?

A. It was the voice of the defendant Rayson.

Q. Would you relate to us that telephone conversation, please?

A. Yes, sir, as I recall. Fletcher answered the phone and the voice said, "Do you know who this is?" Rayson's voice.

And Fletcher said, "No. Who is this?"

He said, "You don't know who this is?"

Fletcher said, "F. A.?"

He said, "Yes." So he said, "The old man told you to call me?"

Q. Who said that?

A. Fletcher made that statement, "Did the old man tell you to call me?" He said, "Did Kelley tell you to call me?"

He said, "He gave me this number, but he didn't say anything as to what you wanted." He says, then Rayson says, [235] "Well, where are you? How can

(Testimony of William R. Farrington.)

I get in touch with you and where are you? Are you in the sixties, fifties, seventies, or what?"

And Fletcher stated that he was in the fifties.

Rayson then stated, "Well, you can't get to me now. You are in bed, aren't you?"

Fletcher stated no, he could get to him.

Rayson then stated, he directed Fletcher to meet him at 58th and Hoover in approximately 20 minutes.

Q. Is that all the conversation that you recall?

A. As I recall.

Q. All right. Were you present at a later time, approximately noon or thereabouts, at the same place on the same date when another telephone call came in?

A. Yes, sir, I was.

Q. Did more than one call come in very close together at that time?

A. Yes, sir.

Q. Did you take the calls?

A. I listened to the calls. I did not take them.

Q. You did not answer the phone?

A. No, sir.

Q. Mr. Fletcher answered the phone?

A. He did.

Q. Did you recognize the voice that was on the other [236] end of the telephone conversation from Mr. Fletcher on the first of those telephone calls?

A. Will you state the question again?

Q. Let me rephrase the question. Calling your attention to the first of the two calls that came in near noon, would you state whether or not you recognized the person calling?

(Testimony of William R. Farrington.)

A. Yes, sir.

Q. Who was the person?

A. It was the defendant Rayson.

Q. Did you hear all that telephone conversation?
A. Yes, sir, I did.

Q. Would you state the substance in effect or the words, if you recall, of that conversation?

A. At that time Fletcher stated that he only could get to Rayson, asked him what did he want, did he want the two, he couldn't do any better on the price, and there was a conversation about the price.

Fletcher stated he only wanted the two.

Rayson stated that it would be approximately 5:30 before he could do any good.

Fletcher then stated that that was rather late, as he had an errand to run.

Rayson then stated, started to give Fletcher some numbers, in fact, he gave him approximately five numbers, then [237] he changed his mind and said, "Wait a minute. I will call you back. I might fix it so we can do it right now."

Q. Was that the end of that conversation?

A. That was the end of that conversation.

Q. Now, another telephone conversation occurred immediately afterwards, did it not?

A. Approximately two or three minutes after that.

Q. Did you listen in to that telephone conversation?
A. Yes, sir, I did.

(Testimony of William R. Farrington.)

Q. Did you recognize the person originating that call?
A. Yes, sir, I did.

Q. I mean by that the person calling Mr. Fletcher?
A. Yes, sir.

Q. Will you state who that person was?

A. Defendant Rayson.

Q. Would you state to us the substance in effect or words, if you recall them, in that conversation?

A. At that time the defendant stated it would be impossible to do it before the 5:30 time.

Fletcher then stated that that was still too late, he wanted to do it before dark.

Rayson then said, "Well, how about 6:00. It isn't dark then."

Fletcher said, "That's all right."

So he said 6:30, and so the both of them agreed on [238] 6:30 as the time.

Fletcher then said that he had the money and that he did not wish to carry the money around all day, and did Rayson want the money at that time?

Rayson then stated, yes, and he directed Fletcher to meet him as he stated on the same one and Main.

Fletcher then said, "Do you mean 58th or 57th? We pulled off on 58th Street."

Rayson then said 58th and Main.

Q. And was that all the conversation?

A. That was substantially all of that conversation.

Q. Now, Mr. Farrington, are you the officer that

(Testimony of William R. Farrington.)

furnished this Minifon that we heard testimony about?

A. I was the officer that placed the Minifon on Fletcher.

Q. Was the first occasion that you placed this Minifon on Fletcher prior to the meeting at the La Jolla Cleaners that occurred in the morning of September 13th?

A. That is correct.

Q. Where was this done?

A. It was done at my home at that time.

Q. First of all, give us very briefly a description of this device, will you, please?

A. It is a small white plastic box, you might say, approximately one inch thick, six and a half inches long and [239] four inches across. It has a place for an attachment on the top. It has a button that you pull out at the top to engage the device. On this attachment you place a plug similar to a tape or wire recorder with a microphone into this attachment, and it has a cord that goes up and holds the microphone.

Q. Did you have the microphone in the cord at the same time? A. I did.

Q. What was the approximate length of that cord?

A. I should say about approximately two and a half feet. It would reach from the inner part, as I recall it, of a man's leg to his breast pocket here in a standing position.

Q. How was this device attached?

A. It was attached at that time to his left leg

(Testimony of William R. Farrington.)

by adhesive tape, and the microphone was engaged under his shirt and behind his inside shirt pocket, and pinned there with a safety pin.

Q. After this meeting at the La Jolla Cleaners that morning, September 13, was this Minifon returned to you?

A. Yes, sir, it was. I took it off of Fletcher's person myself.

Q. At a later date did you examine it in detail?

A. Yes, sir, I did.

Q. Would you state for the court its appearance at the time of your examination. [240]

A. At the time of the examination, we——

Q. Perhaps I should direct you a little bit in this, Mr. Farrington. This recording device uses a wire, does it not?

A. It does.

Q. Had the wire been unwound from the reel?

A. Yes, the wire had been progressing.

Q. Did you attempt to play the wire?

A. Yes, we did.

Q. Was there any sound on it?

A. There was not.

Q. Would this indicate whether the machine was turned on?

A. The machine was engaged.

Q. It wouldn't unreel the wire without having been turned on?

A. No, sir.

Q. What was the appearance of the connection between the microphone and the recording device?

A. It was approximately one-eighth inch up out of the actual socket. It has a clamp, a **button clamp** at the bottom of it. This was not engaged.

(Testimony of William R. Farrington.)

Q. Is the electrical circuit completed when there is a one-inch gap there?

A. No, sir, it isn't.

Q. So although the reel had run, nothing had been transmitted [241] from the microphone to the wire?

A. That is true.

Q. The wire was blank. You did play it, did you not?

A. Yes, we did.

Q. Did you place this recording device on the person of Mr. Fletcher on any occasions on September 14, 1955?

A. Yes, sir, I did.

Q. When was the first occasion?

A. At approximately, I should say 11:55, almost noon, at the time of the second call, after the second call, a little after 12:00 o'clock.

Q. Was it placed on Mr. Fletcher's person in the same fashion as it had been before, as you have described?

A. It was.

Q. Was this recording device returned to you after the meeting between Fletcher and defendant Rayson at 58th and Main?

A. Yes, sir, it was.

Q. Did you subsequently play this recording?

A. I turned it over to Sergeant Landry. We in turn took it to the Scientific Investigation crew, who transferred the contents.

Q. Let's do it this way. Have you heard the recording taken at that time?

A. Yes, sir, I have. [242]

Q. Would you describe to the court whether or

(Testimony of William R. Farrington.)

not it was intelligible? I mean by that, can it be clearly understood?

A. Parts of it can, yes, sir.

Q. Did you use this recording device on another occasion other than these two that you have testified to?

A. On the 22nd of September.

Q. Was that placed on Mr. Fletcher's person by you at that time?

A. Yes, by Sergeant Landry and myself, it was.

Q. Was this prior to the meeting that Mr. Fletcher had with the defendant Kelley when Mr. Kelley, I believe, was sweeping the sidewalk?

A. It was.

Q. Was the recording device retrieved by you after this meeting?

A. It was.

Q. Have you had occasion to listen to the recording taken at that time?

A. Yes, sir, I have.

Q. Would you state whether or not that recording is intelligible?

A. At first, no. It is intelligible after quite a few times listening to it, but at first it isn't.

Mr. Neblett: If your Honor please, we move that any further testimony about this recording he is talking about now, September 22, be—we object to it on the ground he has already said after listening to it several times, it is unintelligible.

Mr. Jensen: I think his testimony was the other way.

The Court: He said if you played it long enough

(Testimony of William R. Farrington.)

and many times, you could pick up a word here and there and finally decide what it meant.

Mr. Neblett: Very well, your Honor.

Q. (By Mr. Jensen): On these instances of listening to this, is there a lot of background noise, engineering defects, and so on?

A. Yes, sir, there are.

Mr. Jensen: May I have just a moment, your Honor? I have no further questions.

Mr. Neblett: We don't have any questions, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Jensen: Call Mr. Gowans.

WILLIAM J. GOWANS

called as a witness by and on behalf of the government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand please, and state your name? [244]

The Witness: William J. Gowans.

Direct Examination

Q. (By Mr. Jensen): For the benefit of counsel for the defense, would you state your full name, please? A. William J. Gowans.

Q. You are a resident of the city of San Francisco, are you not?

A. I am employed at San Francisco.

Q. Where do you reside?

(Testimony of William J. Gowans.)

A. San Jose, California.

Q. Are you an employee of the federal government?

A. I am.

Q. In what capacity?

A. As a chemist for the Internal Revenue Bureau of the Treasury Department.

Q. In the course of your going through school, did you study chemistry?

A. I did.

Q. Have you graduated from a college?

A. I hold a B.S. degree in chemistry.

Q. What college did you graduate from?

A. University of San Francisco.

Q. You say with a degree in chemistry?

A. B.S. degree in chemistry. [245]

Q. What time was that you graduated?

A. 1941.

Q. And have you been employed—

Mr. Neblett: If the court please, we will not require the government to establish this witness' qualifications any further.

The Court: All right.

Mr. Jensen: I take it from that statement that they are stipulating that this man is qualified to make a chemical analysis of a substance delivered to him, tell us the quantity and tell us the substance it is.

Mr. Neblett: Yes, that's right.

Q. (By Mr. Jensen): I will ask you whether or not some time in the month of September 1955 you received through the mail the envelope that I

(Testimony of William J. Gowans.)

here hand you, which has been admitted as Government's Exhibit 2. A. I did.

Q. At the time you received it, would you state whether or not it was sealed? A. It was.

Q. I now hand you Government's Exhibit 2-A, which is another envelope, and ask you whether or not at the time that you opened the first exhibit I handed you, No. 2, it contained Exhibit 2-A.

A. It did. [246]

Q. And I further hand you Government's Exhibits 2-B, 2-C, 2-D, and 2-E. I would like you to examine them and tell us whether or not those exhibits were included in Exhibit 2-A at the time that you opened it. A. They were.

Q. Have you identified those last four exhibits so that you recognize them?

A. Yes. My initials are on them.

Q. Can you tell us the date that you received them?

A. I received them in our laboratory on the 16th of September 1955.

Q. Now, I will ask you whether or not they have been in your possession or under your control until I took them away from you in the court room this morning. A. They have.

Q. Did you weigh the contents of the four packages that are marked Exhibit 2-B, 2-C, 2-D and 2-E? A. I did.

Q. What did you find their weight to be?

A. I believe it was a little over two ounces. To be exact, two ounces, 64 grains.

(Testimony of William J. Gowans.)

Q. Was that before or after you made the analysis?

A. It weighed two ounces, 82 grains, before and two ounces, 64 grains, after. We used up 18 grains in the analysis. [247]

Q. You used 18 grains in the analysis?

A. That is correct.

Mr. Neblett: Pardon me, counsel. May I inquire what a grain is of an ounce, or what the percentage is?

Q. (By Mr. Jensen): How many grains in an ounce, Mr. Gowans? A. 437.

Q. A grain is a subdivision of weight in an ounce, is it not? A. Yes, that is correct.

Q. Did you run a qualitative analysis on the substances contained in these packages?

A. I did.

Q. What did you find? A. It was heroin.

Q. Did you run a quantitative examination on the substance contained in these packages?

A. I did.

Q. Will you tell us what percentage of heroin was found to be contained therein?

A. 21.7 heroin.

Q. Would you state for the court whether or not heroin is a derivative of opium? A. It is.

Mr. Jensen: I have no further questions. [248]

Mr. Neblett: No cross examination.

The Court: You may step down. May this witness be excused? I suspect he wants to get back to San Francisco.

(Testimony of William J. Gowans.)

Mr. Jensen: I have no further questions.

Mr. Neblett: We have no further use for **him**, your Honor.

The Court: You may be excused.

The Witness: Thank you.

(Witness excused.)

Mr. Jensen: Would it be convenient to take a short recess?

The Court: Yes, we can take our recess now. We will recess until 10 minutes to 3:00.

(Recess.)

Mr. Jensen: Your Honor, we would like permission to recall Mr. Fletcher for just one or two very brief questions.

The Court: I am very suspicious when you want to call a witness for one or two questions, because it usually goes to more than that. What more can he testify to? There has been absolutely no testimony to controvert his testimony so far.

Mr. Jensen: That's right, your Honor. I was going to offer testimony as to where he was between a quarter to 5:00 and 6:00 o'clock on September 14th.

The Court: I think I will deny your request. I don't think it is necessary to call him back.

Mr. Jensen: All right, your Honor. May the court's ruling [249] be qualified to this extent, that if it becomes material, I may do it on rebuttal?

The Court: Yes. If it becomes material, you may bring him back on rebuttal.

Mr. Jensen: Thank you, your Honor. The

United States has no further witnesses it wishes to call. What other witnesses I contemplated and mentioned in my trial memorandum are cumulative, and I will not call them.

The United States rests.

Mr. Neblett: If the court please, the defendants yesterday made a motion to strike certain parts of the testimony of the witness Fletcher. I didn't quite understand whether the court took it under submission.

The Court: I didn't take it under submission, but I didn't bar the door. I allowed an opportunity to make another motion, and you are privileged at this time to make any motion you see fit.

I ruled before there was any testimony before the court. The only testimony I had was that the conversation was overheard by people standing by the receiver. There had been no wires or no attempt to tap the telephone conversation, or anything like that. That is why I ruled. But I ruled because I did not think all the evidence was in and I was not qualified to pass upon it.

Mr. Neblett: Your Honor please, I don't think the situation has changed. [250]

The Court: You make your motion and we will pass upon it.

Mr. Neblett: I don't believe I shall renew that motion because in the circumstances I don't think the situation has changed at all. I think it is just as it was, that the only testimony before the court at the present time is something that the court has passed upon, listening in over a receiver.

The Court: No. We have testimony that there was a wire attached to the receiver and there was a listening device. We have that testimony.

Mr. Neblett: That testimony doesn't go any further than to say that they did have a listening device attached, but they haven't offered it.

The Court: That's right. They haven't offered anything at all about that so-called device except some of the witnesses testified that they listened, and whether or not they listened to the telephone receiver or whether they were listening through the listening device, I don't know, but they listened to the conversation and they testified to what they heard.

Mr. Neblett: If your Honor please, it is considered that the government hasn't connected it up. It is not proved whether they listened over a receiver or listened to the recording device. It would be clearly inadmissible and the motion to strike, I think, should be granted. [251]

The Court: I haven't got a motion to strike so far. If you will state your motion to strike in general terms, you don't have to specify the exact testimony, but in general terms, then I can rule.

Mr. Neblett: May I consult with Mr. Dudley a minute?

If your Honor please, I can't specify in any more particularity than moving to strike the testimony of the witness Fletcher and the witness Farrington and the witness Richards as to their testimony relating to that part of the evidence which has been produced by the government on the propo-

sition that certain telephone conversations were made to the house of Richards on his telephone number, and to that telephone was attached a listening device which the government has shown was attached, a tape recorder, and it has been testified here that the tape recordation was somewhat indefinite, but you could listen to it several times and tell what it said, so I assume that the testimony that they are giving here is testimony they learned from this tape recorder which they have not yet offered in evidence.

I feel that the motion to strike could be well taken upon the ground that obtaining evidence in that manner is in violation of Section 605, I believe it is, 47 USCA.

The Court: I am familiar with the section.

Mr. Neblett: I think it is 47 USCA. I am not sure. The testimony is adduced in violation of the defendants' rights [252] guaranteed to them under the Fourth and Fourteenth Amendments to the Constitution of the United States.

The Court: Colonel, yesterday when you made your motion I denied the motion primarily upon the ground that at that time there was no testimony of any listening device. The only testimony was that one of the witnesses had stood by the earphone and heard the conversation, but I anticipated from what was said that there was going to be some testimony of a listening device, and I assumed maybe this case would fall within the rule as laid down in *People vs. Cahan*, which has caused so much controversy in the District Attorney's office. I thought

maybe this case might fall in the same category.

I will have to admit I did not know what the rule was and I thought possibly that there might be some difference between the United States and the California rule. I think I stated this yesterday. I might say this. If there is a United States Supreme Court case, I must necessarily follow the United States Supreme Court. If there is no United States Supreme Court, but there is a Ninth Circuit case, I have to follow the Ninth Circuit. If there is no Ninth Circuit decision and there are decisions in other circuits, I may follow those circuits or I may not. I don't think I am obligated to. And, of course, I am not obligated to follow a decision of a District Court. Even we disagree among ourselves in this District as to what the law is. So first I want to know whether [253] or not the Supreme Court has spoken. If the Supreme Court hasn't spoken, I want to know what the Ninth Circuit has said, if it has passed upon the matter. If the Ninth Circuit has not passed upon the matter, I want to know what the other circuits have said.

Yesterday, I did not know what the law was and what the rule was in this Circuit. The government referred me to the case of *Goldman vs. United States*, 316 U.S. 129. But the most important thing in that decision that I found was the statement of Chief Justice Stone, and Chief Justice Stone said—this is a Supreme Court case which did not arise in this Circuit. It arose in another Circuit. But Chief Justice Stone said:

“Had the majority of the court at this time been

willing to overrule the Olmstead case, we should have been happy to join them, but as they have declined to do so"—

So I wanted to know what the Olmstead case was that the United States Supreme Court had refused to overrule. So I got out the Olmstead case, and lo and behold, it is a Ninth Circuit case. It arose in this Circuit. I might read the syllabus to you.

“Use in evidence in a criminal trial in the federal court of an incriminating telephone conversation voluntarily conducted by the accused and [254] secretly overheard from a tapped wire by a government officer does not compel the accused to be a witness against himself in violation of the Fifth Amendment.”

In that case the defendants were convicted in the lower court, went to the Ninth Circuit, the Ninth Circuit affirmed the conviction, and it went to the Supreme Court on certiorari and the Supreme Court sustained the conviction. In that case the testimony was gathered and gotten by the use of telephone.

One of the latest cases that has been brought to my attention, and this is really a late case, because it was decided in April of this year, is *Flanders vs. United States*. *Flanders vs. United States* points out there is a division in the Circuits on the rule.

Assuming that these telephone conversations cannot be admitted if there is a tapped wire, there seems to be an opinion among some of the Circuits that you don't have to get consent of both parties, that if you have consent of one party that is suf-

ficient. In this latest case here, which comes from the Sixth Circuit, that is the opinion.

"We are of the opinion," so the court says, "that where by means of an extension phone or other device a third party listens in on a telephone conversation with the consent of one party, there is no interception of communication within [255] the meaning of the statute."

Not only that, but one of the other cases cited to me was the case in New York where Judge Hand had written the opinion, and after the coming down of the Supreme Court case, the Golden case, Judge Hand stated he did not believe that the Golden vs. United States case had overruled the decision in the Court of Appeals of United States vs. Polokoff. So there in the Circuits there is this division. One Circuit holds if there is an intercepted telephone conversation, it can't be used. In fact, it destroys all the testimony. It doesn't destroy that particular part of the testimony, but all the testimony.

There is another line of cases among the Circuits that holds if you have consent of one of the parties, that is sufficient.

Of course, we have consent of one of the parties. We have the consent of the informer. He is the one making the telephone call and he consented. If we follow the rule in *Flanders vs. United States*, the conversation is admissible. If we follow the rule in the *Olmstead* case, the conversation is admissible. The Ninth Circuit has already ruled as far as telephone conversations in this state are concerned.

So I have to deny your motion.

Mr. Neblett: Your Honor please, a motion I desire to make at this time is a motion for acquittal of both the defendants [256] under Rule 29 of the Rules of Criminal Procedure. Of course, that motion is based primarily upon two grounds.

Ground No. 1 is that there isn't sufficient evidence here to establish that any offense has been committed. I want to divide this motion in the indictment between Count 1 and Counts 2 and 3. Count 1 is the conspiracy count. We are of the opinion that there is some difference between the situation covered by Count 1, the conspiracy count. There are different principles of law applicable to that than there are to Counts 2 and 3. I will devote myself first to Counts 2 and 3.

In our opinion, we believe firmly that there is no evidence whatever to sustain a conviction under those two counts, either of those two counts, I should say. Count 2 is:

"On or about September 13, 1955, in Los Angeles County, California, within the Central Division of the Southern District of California, defendants Ollie W. Kelley and Eugene Rayson did, after importation, knowingly and unlawfully receive, conceal, and transport, and facilitate the concealment and transportation of a certain narcotic drug, namely: Approximately two ounces, 82 grains, of heroin."

The other count, Count 3, that we are talking about at this moment is: [257]

"On or about September 13, 1955 in Los Angeles

County, California, within the Central Division of the Southern District of California, defendants did knowingly and unlawfully sell and facilitate the sale of a certain narcotic drug, namely, approximately two ounces, 82 grains, of heroin, to Norman Fletcher."

The only evidence the government has offered to sustain the charge in those two counts is that they have an informer named Fletcher, and Fletcher, or special agent I think the government calls him, is a man of a long criminal background. He is 35 years old. He has been convicted three times, twice for narcotics and once for receiving stolen property. He has served a term in the federal penitentiary arising out of Louisiana for conviction under the Harrison Narcotics Act. He served a term in the state court in California in Folsom Penitentiary, three years, and only got out in 1953.

The agents were evidently trying to pin something on Kelley and Rayson, so they got this man to go to see Kelley. The conversations with Kelley were that they wanted to know whether he could get some of the stuff, that is, the conversation testified to so far was that, and Fletcher said he referred him to Rayson.

Then nothing happened for 22 days at all. Didn't hear from Kelley. Didn't hear from Rayson. So they got excited and sent him back, and this time they put a wire recording instrument on his leg with a microphone in his pocket. He came back and gave about the same conversation with Kelley.

Then, of course, the court remembers the evidence

well, but to come right to the point in this case, finally, some of the things in this case are incredible of belief——

The Court: You are making a motion for acquittal upon the lack of the government's evidence or based upon the lack of the government's evidence?

Mr. Neblett: Yes, your Honor.

The Court: Now, if I would believe the government's witness, you are asking me to pass upon the question now of whether I believe the government's witnesses or not.

Mr. Neblett: That's right.

The Court: But upon your motion I have to take the testimony for what it stands for. I am not passing upon the credibility of the testimony. I am taking the testimony as the fact and as true. If he is telling the truth, then your motion has to be denied.

Mr. Neblett: That is correct, your Honor. But a point we would like to make in this motion, if you will allow me, I will ask Mr. Dudley to argue this motion. We would like to present to the court as a matter of law at this time that the evidence shows here even if the court has to believe all the [259] testimony that is in at this time, that there was an entrapment.

The Court: I don't think that I can pass upon the question of entrapment until I hear the testimony of the defendants. I don't know whether they were entrapped or not. They haven't told me they were entrapped. You are telling me they were en-

trapped, but maybe they will get on the stand and say, "No, I was not entrapped." I don't know what they are going to testify to. Your motion may be good, but I think it is a little premature.

It may be that the defendants can produce testimony that they will show that they were entrapped, but as far as the testimony now stands, I think I am going to have to deny your motion.

Mr. Neblett: Very well, your Honor. We will call our first witness.

The Court: Call your first witness.

Mr. Neblett: Mr. Kelley.

OLLIE W. KELLEY

one of the defendants herein, called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Ollie W. Kelley. [260]

Direct Examination

Q. (By Mr. Neblett): Your name is Ollie W. Kelley? A. Yes.

Q. Where do you live, Mr. Kelley?

A. 1818 Victoria Avenue, Los Angeles.

Q. Speak up a little louder, please.

A. 1818 South Victoria Avenue, Los Angeles.

Q. How long have you lived there?

A. About a year.

Q. Prior to that time you lived in Los Angeles County at another address? A. Yes.

Q. Where was that?

(Testimony of Ollie W. Kelley.)

A. 346 East Golden Avenue.

Q. You lived at that address for several years, didn't you? A. Several years.

Q. Do you know the defendant Rayson?

A. Yes.

Q. How long have you known him?

A. Well, I couldn't exactly say, but I have seen him come in and out of the cafe for a year, year and a half.

Q. You have two businesses. One is a cleaning shop and the other is a—— [261]

A. Cafe.

Q. A cafe? A. Yes, sir.

Q. Where is the cafe?

A. 723 East Sixth Street.

Q. That is about a block from the La Jolla Cleaners?

A. No. It is just across the street, about 40 or 50 feet.

Q. Can you tell us now how you met the defendant Rayson or how you came to know him? How did you come to know him?

A. Just casual, coming in the cafe eating.

Q. To do what?

A. Coming in the cafe eating at different times, and then I did some cleaning for him.

Q. Did anyone ever introduce you to him?

A. Well, no, not formal introduction or anything like that. Just casual coming in, hello, and meeting him coming in the shop and getting his name that way, and taking in his clothes.

(Testimony of Ollie W. Kelley.)

Q. Have you ever had any business transactions with him of any kind? A. No.

Q. How long has this casual acquaintance existed?

A. Oh, possibly a year and a half. Some time in 1954.

Q. You act as cashier in the cafe sometimes, don't you? [262] A. Yes.

Q. You are around there quite a bit?

A. Yes.

Q. You manage it and supervise it?

A. I do.

Q. You are familiar with most of the patrons who come in there, you know them after a while if they come in quite often, do you not?

A. That's right.

Q. Is that the extent of your acquaintance with Rayson? A. Yes, sir.

Q. Do you know Norman Fletcher?

A. Well, yes, casually, the same way. Just practically the same as I do Mr. Rayson.

Q. Tell us how you met him?

A. I met him practically the same way, coming in and out of the cafe. I have a girl waitress who is there and I understand that they lived at the same address at one time and he used to come in to see her, pick her up from work, and I knew him as Norman. I did not know his name as Fletcher until this case.

Q. Did you ever have any business transactions of any sort with Norman Fletcher?

(Testimony of Ollie W. Kelley.)

A. No, sir.

Q. Did you ever at any time have any dealings with him [263] in heroin or any other narcotic?

A. No.

Q. About when did you first see Mr. Fletcher?

A. Some time in 1954, because he—I never met him personally until, oh, up in 1955. Just come in contact with him and someone said, "This is Norman," but I did not know his name was Fletcher.

Q. He used to come into the cafe from time to time? A. Yes.

Q. And did he come in the cleaning shop from time to time?

A. I don't remember him coming into the cleaning shop but once.

Q. I am talking about prior to August 22.

A. No.

Q. You don't remember him ever being in the cleaning shop prior to August 22?

A. No.

Q. But he used to be a frequent patron of the cafe, did he not? A. That is correct.

Q. He used to come around and see the girl that was working there from time to time, did he not?

A. He did.

Q. You were never formally introduced to him?

A. No, sir.

Q. Just happened to pick up his name as a customer of the cafe? A. That's right.

Q. Do you know Mr. Richards? A. No.

Q. You don't remember meeting him until——

(Testimony of Ollie W. Kelley.)

A. Yesterday is the first time I ever saw him.

Q. Do you know Mr. Farrington?

A. Just by sight.

Q. This gentleman here?

A. That was the one made the arrest. That was the first time I have seen him, the 7th of October.

Q. Going to the 22nd of August, do you remember seeing Norman Fletcher on that day?

A. As far as to remember the date, I don't remember the correct date, but——

Q. How many times did you see him at the La Jolla Cleaners that you recall, how many times?

A. Two times.

Q. Can you tell us the exact date of either one of the dates or both of them? A. No, I can't.

Q. It was some time in the summer or early fall of this year, was it not? [265]

A. Yes, it was.

Q. You do remember his coming to the cafe, say on or about August 22? A. To the cleaners.

Q. I mean the cleaners. A. Yes.

Q. What were you doing when he arrived?

A. I think I was reading a paper or book or something when he came in.

Q. Where were you sitting in the cleaning shop?

A. I have a counter something similar to this and I was sitting behind a counter close to the sewing machine I have in the corner in the front window.

Q. Do you remember the time of day, approximately, he came in?

(Testimony of Ollie W. Kelley.)

A. It was in the morning.

Q. You don't know what time, though?

A. No, not exact time, no, sir.

Q. Was anyone else in the cleaning shop at the time he came except you and himself?

A. No, there was not.

Q. When he came in, did he speak to you?

A. Yes, he did.

Q. What did he say?

A. He said hello, and I said hello, how have you been, [266] where have you been, I haven't seen you for quite a while.

He says, "No, I haven't been around lately."

I said, "Well, how is everything going," just like that.

Q. Just a minute. I will ask you for the conversation. A. I beg your pardon.

Q. Go ahead and relate the conversation between you and Fletcher at this time, this first trip to the cleaners.

A. I said, "How is everything going?"

He said, "Oh, not too much."

I said, "What you got on your mind this morning?" Just like that.

He said, "I come in to see if you can help me out."

I said, "Help you out how?"

He said, "To see if I can make a buy."

I said, "I don't know what you are talking about. What kind of buy?"

He said, "Some stuff."

(Testimony of Ollie W. Kelley.)

I said, "I don't know anything about it because I am in enough trouble. I thought you were, too, because I am on probation and Judge Yankwich granted me probation with the understanding not to have any conversation or association with anyone had any narcotic activities."

And so I know he just got out of trouble, someone had said, it was rumored around the streets, and he was supposed [267] to be on parole.

I said, "I am not supposed to talk to you or anyone else that had any trouble prior to my trial, and Judge Yankwich told me and give me those instructions not to talk or have any conversation with anyone that had any activities in narcotics."

Q. You knew from general reports that he had been convicted on a narcotics charge?

A. Yes, I did, just from reports.

Q. What?

A. Just from general reports, rumors in the street and things.

Q. Around that area there was a general report he had been? A. Yes.

Q. You didn't know anything about it otherwise, did you? A. No, I did not.

Q. Just what you heard, general report around the street? A. That's right.

Q. What did Fletcher say after you told him you didn't want to talk?

A. He said, "I just thought you might be able to help me." [268]

I said, "I would be the biggest fool in the world

(Testimony of Ollie W. Kelley.)

if I had any stuff to let you or anyone else have it." I said, "I wouldn't let my brother have it under the conditions."

He said, "Okay," and walked on out.

Q. How long was he there?

A. Seven or eight minutes, something like that. not over 10 minutes, I am sure.

Q. At that time did you say to him that you would put him in touch with any person or persons where narcotics might be obtained?

A. No, I did not.

Q. Did you say to him you would put him in touch with the defendant Eugene Rayson?

A. No, I did not.

Q. Did you tell him you would give him the telephone number of Eugene Rayson?

A. No.

Q. You have related all the conversation that took place between you and him at that time?

A. At that time, yes.

Q. When was the next time you saw him? You saw him once after that, I mean Fletcher.

A. Yes. I was sweeping the sidewalk, and so I never stopped sweeping. He went kind of round me, and he said, "Hello. How are you this morning?"

I said, "Okay. How are you?" And kept on sweeping. I said, "Where is Mary?" I said, "I need a new waitress. I am short a waitress."

He said, "I don't know. I haven't seen her for quite a while," and it seemed to me he was still walking.

(Testimony of Ollie W. Kelley.)

Q. Who was Mary?

A. That was the girl that formerly was a waitress at the cafe.

Q. That he used to come there to see?

A. Yes, that's right. So I don't know which way he went. I thought he went into the entrance of the hotel, because I didn't look around. I just kept on sweeping. That was the conversation at that time.

Q. How long was he there at that time?

A. Oh, say, four or five minutes, something like that.

Q. Then he walked on?

A. Kept on walking.

Q. Did he come up in a car, or do you recall?

A. I don't recall. I know he was walking, coming from the east—no—yes, coming from the east, because I was sweeping this way and he came from this direction.

Q. On the first time he came up, did he come up in a car, or do you know?

A. I don't know. I didn't see him.

Q. You didn't observe the car, did you? [270]

A. No, sir, I did not. I was sitting inside.

Q. Did you at any time call Rayson and mention to him that—well, I will withdraw that. You heard Fletcher's testimony here?

A. Yes, I did.

Q. You remember what he had to say?

A. Yes.

Q. Did you at any time give him a telephone number for Rayson?

A. No, I did not.

Q. Did you ever mention Rayson's name to him?

(Testimony of Ollie W. Kelley.)

A. No, sir. The name never was called.

Q. Did you tell him to see somebody else and give him Rayson's telephone number, or anything of that sort? A. I did not.

Q. Did you mention it at all?

A. No, sir, no conversation.

Q. Did you mention anything about narcotics that could be procured at either of these conversations? A. No, sir.

Q. From Rayson or anybody else?

A. No, sir.

Q. You told him what you said?

A. I told him what I said in the first conversation, because I was on probation and was not supposed to talk to anyone [271] or associate with anyone who had any narcotic activities.

Q. You didn't want to have anything to do with him or anybody else? A. That's right.

Q. You didn't have anything to do with narcotics, is that right? A. That's right.

The Court: May I suggest you don't try to answer the questions until after they are asked, because it is very difficult for the reporter to pick up two conversations at one time. I have got a good reporter, but you are asking the impossible.

Mr. Neblett: I am probably at fault, your Honor. by interrupting to a certain extent.

Q. Have you ever at any time had any narcotic transactions with Rayson? A. No, sir.

Q. Have you had any with anybody?

A. No, sir.

(Testimony of Ollie W. Kelley.)

The Court: Now, wait a minute. Do you understand the question?

Mr. Neblett: I think he answered too quickly, your Honor.

The Court: I am afraid he did when you said anybody at any time.

The Witness: Well, when my former trial, that was 1952—— [272]

Q. (By Mr. Neblett): But the point is, I was going to put something else in the question if you had followed the judge's advice.

The Court: You be careful as to how you answer. Don't answer too fast here because you are telling me that you never at any time have been convicted for narcotics traffic.

The Witness: Yes, in 1952, when I were convicted.

The Court: In 1952?

The Witness: Yes.

The Court: All right.

Q. (By Mr. Neblett): Mr. Kelley, please follow the court's admonition.

A. I thought they pertained to this case.

Q. I was going to take care of it since 1952. I will re-form the question. Have you at any time had any narcotic transactions with Rayson, with Fletcher, or anybody else, since May 11, 1952?

A. No, sir.

Q. What did you say?

A. No, sir, I have not.

(Testimony of Ollie W. Kelley.)

Q. Have you at any time since May 11, 1952, discussed the question of the sale of narcotics?

A. In 1953——

Q. Wait a minute now. Let me finish. Have you at any time since May 11, 1952, discussed the question of possible [273] sale, transportation or in any manner the handling of narcotics?

A. No, sir, I have not.

Q. After Fletcher was in your cleaning shop or saw you in front of the cleaning shop on or about September 13, 1955, did you observe Fletcher from that time until you saw him here in court?

A. On what date was that?

Q. September 13th, the time you saw him on the street when you were sweeping in front of the cleaning shop. Have you seen him from that time until now, Fletcher?

A. No, I have not.

Q. Have you had any communications with him by telephone or otherwise?

A. No, sir, I have not.

Q. As I understand you, the only times you have seen him at all except in the cafe casually, as you have mentioned, were the two times that he came to your cleaning shop at 806 East Sixth Street, the first time about August 22, 1955, and the second time about September 13, 1955. Are those the only times you have seen him except in the cafe, as I understand?

A. Yes, sir, that is the only time I have seen him.

Q. Have you had any conversations with him

(Testimony of Ollie W. Kelley.)

except on the two occasions at any time since May 11, 1952? A. No, I have not. [274]

Q. Was there any call made by Fletcher upon you in addition to the two calls you have mentioned? You heard Fletcher's testimony he called by to see you again about the—well, some time after the 13th. I think he said September 22nd. Did you see Fletcher a third time that he has testified about?

A. No, I don't remember seeing him other than those two times.

Q. At either of these two conversations that you had with Fletcher, did you give Fletcher the phone number where he could reach Rayson?

Mr. Jensen: I object to that as asked and answered three times, your Honor.

Mr. Neblett: Did I ask that before?

Mr. Jensen: And in each instance he said no.

The Court: He said no, he didn't give any telephone number.

Mr. Neblett: You may cross examine.

Cross Examination

Q. (By Mr. Jensen): Mr. Kelley, you say you have only known Rayson for about a year and a half, or a year, is that correct?

A. Something like that.

Q. Never had any conversations with him other than just casual ones around your place of business? [275] A. That's right.

(Testimony of Ollie W. Kelley.)

Q. Keep your voice up so I can hear you, Mr. Kelley. A. Thank you.

Q. You have had no business transactions with him? A. None whatsoever.

Q. Of any kind, type or description, is that right? A. Sir?

Q. None whatever, is that your answer?

A. That's right.

Q. You have done some cleaning.

A. That is the only transaction, cleaning.

Q. You have taken cleaning from him?

A. Yes.

Q. Isn't that a business transaction?

A. Yes, it is.

The Court: Also he came into the restaurant and ate, and I suppose that is a transaction. That isn't what was in the mind of the questioner, I am quite aware, and not in the mind of the witness.

Mr. Jensen: Let's find out what was in his mind.

Q. What do you mean by a business transaction, Mr. Kelley?

A. I thought you were pertaining to a mercantile transaction, this particular case.

Q. I think you were asked by your lawyer and by myself [276] both whether you had any kind of business transaction.

A. Well, as I say, in my mind the transaction was in this particular case, not in the business, the cleaning or cafe.

Q. Do I understand your testimony to be now,

(Testimony of Ollie W. Kelley.)

all you are saying is you had no transactions with Rayson in regard to this case?

A. That is correct.

Q. You have had other transactions with him?

A. Cleaning and eating.

The Court: Let me ask you this. You haven't had any transactions with him other than eating and cleaning, is that right?

The Witness: Yes, sir, your Honor.

The Court: All right.

Q. (By Mr. Jensen): You say you have had no business transactions with Fletcher with the same exception there about eating and cleaning.

A. I haven't had any cleaning.

Q. Did you ever do any cleaning for him?

A. No, but he has eaten in the place. I have seen him in there quite a few times, and I have a parking lot across the street.

Q. Wait a minute, Mr. Kelley. Answer my question, if you will, please, and then if you have an explanation, I will [277] give you opportunity to make it. Have you ever had any cleaning from Mr. Fletcher?

A. Not that I remember.

Q. You say the first time you saw Mr. Fletcher was in 1954?

A. Yes, it was.

Q. You didn't see him prior to that time?

A. No, I did not, not to know him.

Q. You never saw him in 1953?

A. Not to know him.

Q. He didn't come to your place of business and talk to you in October 1953 or thereabouts?

(Testimony of Ollie W. Kelley.)

A. I don't remember him until 1954.

Q. Have you ever had any conversations with Fletcher, I mean excluding the times when you have seen him just to see him? Have you ever at any time in your life had any conversations with Mr. Fletcher other than these two you have testified about where he came to your place of business in the fall of this year? Have you had any others?

A. I don't remember any others other than maybe in the cafe, hello, good morning, or something, how are you?

To tell the truth, I did not know him—the girl was working there approximately a year before I knew who he was.

Q. When did you first learn his name, Mr. Kelley?

A. Well, his full name, I just learned that in this [278] case.

Q. When did you first learn his first name?

A. When this girl was working there.

Q. When was that? A. That was in 1954.

Q. Some time in 1954? What time?

A. I don't remember the time.

Q. Was it spring, summer, fall, winter?

A. It possibly could be in the fall.

Q. In the fall of 1954.

The Court: Now, counsel, let's let the witness answer. It is hard on my reporter for you to break in.

Mr. Jensen: That is true, your Honor, but this witness wants to go on beyond the scope of the examination.

(Testimony of Ollie W. Kelley.)

The Court: I caution the witness, don't be too fast, take it a little slower.

Q. (By Mr. Jensen): You say you first learned Mr. Fletcher's first name in the fall of 1954?

A. It was in the year 1954. I don't know whether spring, summer, fall or winter, but it was 1954.

Q. How do you place it in 1954?

A. Because the girl was working there at that time. She hasn't worked since the last of 1954.

Q. Was she working there in the summer of 1954? A. Yes. [279]

Q. Was she working in the spring of 1954?

A. I don't recall. I would have to go back and look at my records.

Q. Was she an employee of yours? A. Yes.

Q. How long did she work for you?

A. I couldn't tell you the exact time on that. I would have to look back at the payroll and check back to tell when she started and when she quit.

Q. Did she work for you for over six months?

A. Yes, she did.

Q. More than a year? A. I couldn't say.

Q. What is your best estimate at this time?

A. I would say six months.

Mr. Neblett: Pardon me. If the court please, I think possibly the District Attorney is catching up with the witness a little bit and not giving him a chance to finish.

The Court: That's right. Let's slow down a little bit.

Q. (By Mr. Jensen): Mr. Kelley, the first con-

(Testimony of Ollie W. Kelley.)

versation that you had with Mr. Fletcher, can you fix the date for us? A. I cannot.

Q. Was it this year?

A. Yes, I think it was this year.

Q. Was it in the spring, summer or fall of this year? [280]

A. Possibly it would be summer, I presume.

Q. Is that your memory of it?

A. That is my memory. August, if it was August, as the record shows from the evidence——

Q. Never mind the record, Mr. Kelley.

A. That is the only thing I could by. I couldn't tell you the date. The only thing I can say——

Q. Just a minute, Mr. Kelley. All I want is your memory. What is your best memory that you have as to the time it occurred?

A. I couldn't give you no time on that, because I know it was before September. It was not in September, because I can tell you practically what I was doing in the month of September.

Q. Can't you tell us what you were doing in the month of August? A. No, I can't.

Q. What is so different about August and September?

A. The hunting season opened and I am a fanatic on hunting. The 3rd of September the dove season opened, and it is 30 days.

Q. That is a large landmark in your mind, the 3rd of September? A. Yes.

Q. Did this conversation occur before that date?

A. Yes, it did.

(Testimony of Ollie W. Kelley.)

Q. Is your memory it occurred some time before that time or just a very short time?

A. I don't remember just when it was, a week or two, or it could be a couple of weeks.

Q. Do you recall the time of day?

A. It was in the morning because I was sweeping the sidewalk—not sweeping the sidewalk, but I just got through with cleaning up the place and was sitting down reading the paper.

Q. Were you sweeping the sidewalk on the first occasion? A. No.

Q. We are talking about the first conversation. Let's go back to the first conversation. Where were you when you first saw Mr. Fletcher?

A. Sitting in the cleaners.

Q. I think you said you were sitting behind the counter, is that correct? A. Correct.

Q. You said something about a sewing machine that I didn't catch.

A. I have a sewing machine right in the corner. The counter is like this and in the window is something like that partition where the machine is sitting between this end of the [282] counter. There is about that much space to go between the machine and counter, and I was sitting where the reporter is.

Mr. Jensen: May the record indicate the counter was in front of him and the sewing machine was to his right?

The Witness: To my left.

Q. (By Mr. Jensen): I think you indicated to your right. A. May I show you how?

(Testimony of Ollie W. Kelley.)

The Court: Yes.

The Witness: Here is the counter here. I am sitting right here and the entrance is here. The machine is sitting right here. That would be to my left.

Q. (By Mr. Jensen): All right. Will you resume the stand, Mr. Kelley? Where was the window in relation to you, in front of you, beside you, or——

A. My side.

Q. Which side? A. Left.

Q. When Mr. Fletcher talked to you, where was he? Was he in front of you?

A. He was about where the judge is sitting.

Q. Where was he in relation to you as you sit in the room? Was he in front of you, to your right or to your left?

A. The same position as the reporter and the judge has.

Q. That is to your left?

A. That would be—I was sitting here. That would be [283] to my right.

Mr. Jensen: Does your Honor understand he indicates the right?

The Court: I don't know what difference it makes.

Q. (By Mr. Jensen): You say Mr. Fletcher came in and he wanted to purchase some stuff. Was that the word he used? A. That is correct.

Q. What did you understand him to mean by the word stuff?

A. I understood him to mean narcotics.

(Testimony of Ollie W. Kelley.)

Q. Any particular kind of narcotics?

A. Well, no, no particular kind. Stuff pertains to narcotics, as far as I know.

Q. Do you use the word to mean heroin?

A. No, I do not.

The Court: What term do you use when you talk about marijuana?

The Witness: Well, your Honor, I don't even talk about marijuana.

The Court: So stuff means everything?

The Witness: Every kind of narcotic, I would think.

The Court: All right.

Q. (By Mr. Jensen): You say you had a later conversation with Mr. Fletcher, is that correct?

A. That is correct. [284]

Q. Do you recall how much later than the first it was? A. No, I do not.

Q. Was it after the hunting season opened on September 3rd?

A. Well, to be honest and truthful about it, I don't remember, because it was after the 3rd of the month, I know, because I had been on—that was each week and in September I were hunting, every Saturday and Sunday, and I think this was the second week after I had started hunting.

Q. Do you recall it was among the week-ends that you went hunting?

A. After the week-end.

Q. On this occasion, I think you have testified you were sweeping the street.

(Testimony of Ollie W. Kelley.)

A. The second time, yes, I was.

Q. What did Mr. Fletcher say to you on that occasion?

A. I don't remember. Just said, "Hello. How are you? How's everything?" And he was walking and I was sweeping.

Q. I am just asking you——

Mr. Neblett: I think the witness should be allowed to finish the answer.

The Court: Just a minute. The question was what he said, not what he did. Just say what he said to you.

The Witness: We spoke, and I said, "How are you?" And he said, "Fine. How are you?" He was walking. He didn't [285] even stop, because I said, "Where is Mary?" And he said, "I haven't seen her for some time."

I said, "I need a waitress."

He said, "I haven't seen her for some time," and I kept sweeping and he kept walking.

Q. (By Mr. Jensen): Did he mention the word stuff to you on that occasion?

A. No, he did not.

Q. In either of these conversations, was the defendant Rayson's name mentioned?

A. No, it was not.

Q. In either of these conversations, did Mr. Fletcher tell you his telephone number?

A. No, he did not.

(Testimony of Ollie W. Kelley.)

Q. I think you testified you have never had any discussions about narcotics with anyone since May 1952, is that correct? A. Correct.

Q. You did have a discussion with Mr. Fletcher on this first conversation about stuff, which you say is narcotics?

A. That wasn't a conversation. He asked me about it, if I knew where he could buy some stuff, get some stuff, and I said, "I don't know anything about any stuff and don't want to talk about it, because I have instructions not to talk about it."

Q. Was that a conversation about narcotics?

A. If you think it is a conversation, it is conversation.

Q. Was it about narcotics?

A. I guess you would say it is, then.

Q. Then you are mistaken.

Mr. Neblett: Your Honor, I think this is a wrangle with the witness.

The Court: Sustained. It is argument.

Q. (By Mr. Jensen): You said you have never had any narcotic dealings with Rayson at all, is that correct? A. Correct.

Q. Ever at any time?

A. That is correct.

Q. You pleaded guilty, did you not, before Judge Yankwich of this court?

Mr. Neblett: If the court please, the record is here.

Mr. Jensen: Well, may I ask him?

(Testimony of Ollie W. Kelley.)

The Court: Yes, you can ask him if he has been convicted of a felony.

Q. (By Mr. Jensen): Mr. Kelley, did you plead guilty to possession of narcotics?

A. I did not.

Q. Were you charged with possession of a narcotic? A. I was. [287]

Q. Were you convicted? A. I was.

Q. After trial? A. Yes.

Q. When did that occur?

A. When I was convicted?

Q. Yes. A. May 11, 1953.

Q. 1953? A. Yes, sir.

Q. As a result of that conviction, did you serve a term, were you imprisoned? A. No, sir.

Q. You were placed on probation?

A. Yes, sir.

Mr. Jensen: I don't believe I have any further questions, your Honor.

Mr. Neblett: I don't think we have any redirect, your Honor.

The Court: Step down.

(Witness excused.)

The Court: Call your next witness.

Mr. Neblett: Eugene Rayson. [288]

EUGENE RAYSON

one of the defendants herein, called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name, please?

The Witness: Eugene Rayson.

Direct Examination

Q. (By Mr. Neblett): Mr. Rayson, you are one of the defendants in this action now pending before this court? A. I am.

Q. Where do you live now?

A. 624 East 97th Street.

Q. Have you been living there for a year or more? A. Yes, sir.

Q. Do you know Norman Fletcher?

A. I do.

Q. How long have you known Norman Fletcher?

A. Oh, a little over a year.

Q. How did you meet him?

A. I met him by his wife, which I thought to be his wife.

Q. Were you introduced to him by the woman that you thought was his wife? [289]

A. Not formally.

Q. Did she tell you who he was? A. Yes.

Q. Was he there?

A. I beg your pardon?

Q. Was Fletcher there at the time?

A. Yes, he was there.

(Testimony of Eugene Rayson.)

Q. Did you see Fletcher on the 13th of September? A. No.

Q. How long have you known the defendant Ollie Kelley?

A. Oh, about a year and a half, almost two years.

Q. How did you get in contact with him?

A. I used to go down to the cafe and eat there, and I used to carry my cleaning over to his shop across the street.

Q. Did you carry cleaning to the La Jolla Cleaners? A. Yes.

Q. And were you a patron of the cafe, too?

A. That's right.

Q. How often were you accustomed to go in the cafe, say in a month? A. Every night.

Q. Every night? A. Every night.

Q. Used to go there and eat?

A. Yes. [290]

Q. And you ran into Kelley that way, is that how you met him? A. Yes.

Q. And at the cleaning shop, too?

A. Yes, sir.

Q. You first met him in the cafe, is that right?

A. That's right.

Q. Do you know Officer Farrington?

A. Yes, sir.

Q. When did you meet him?

A. March this year.

Q. In March of this year?

A. That's right.

(Testimony of Eugene Rayson.)

Q. Do you know Officer Landry? A. Yes.

Q. How long have you known him?

A. The same time.

Q. March of this year?

A. That's right.

Q. Did you ever have any conversation, telephone or otherwise, with Ollie W. Kelley, your co-defendant in this case, relating to narcotics?

A. No.

Q. Has the subject ever been mentioned between you and Kelley in any way? [291] A. No.

Q. The subject of narcotics?

A. No.

Q. You never had any talks with him?

A. No, sir.

Q. Did Kelley call you and give you that number that has been testified to here, the number which is said to be Mr. Richards' number?

A. No, sir.

Q. You remember that in the testimony of Mr. Richards and Mr. Fletcher, do you not?

A. Yes, sir.

Q. Did Kelley ever talk to you about Fletcher or give you any information at all about Fletcher?

A. No, sir.

Q. You did meet Fletcher, did you not, on or about the 14th of September this year?

A. Yes, sir.

Q. What were the circumstances? Tell us about that meeting.

A. You mean tell you what the meeting was for?

(Testimony of Eugene Rayson.)

Q. Yes. Did you have some conversation with Fletcher about the meeting before you met with him? A. Yes, sir.

Q. Where was this conversation held? [292]

A. He called me in the recreation shop.

Mr. Jensen: I am going to object to this, your Honor, unless we have a time and place and circumstances.

The Court: He is trying to lay the foundation. You have got to start somewhere. Was this on the 13th or 14th?

The Witness: This was on the 14th.

The Court: What time of the day was it?

Q. (By Mr. Neblett): You had what you call a smoke shop, didn't you? A. Yes.

Q. Where was this located?

A. 3326 South Main.

Q. Did Fletcher ever come into that smoke shop? A. Yes, sir.

Q. When was the first time he ever was in there that you recall?

A. I don't know. Around the last of June.

Q. Did he come in there more than once?

A. Yes, sir.

Q. Quite often? A. Yes, sir.

Q. Was he one of your customers?

A. Well, he used to come there and play dominoes and cards, like we all do.

Q. And buy smokes, or whatever you sold in this place? [293]

A. Sold soft drinks and sandwiches.

(Testimony of Eugene Rayson.)

Q. Tobacco, cigarettes, cigars?

A. Yes, sir.

Q. You say you saw Fletcher on the 14th of September?

A. That's right.

Q. Prior to the 14th of September, had you had a discussion with Fletcher?

A. A discussion?

Q. Yes. Did you have a talk with him prior to the 14th?

A. Yes, sir.

Q. Where was that talk held?

A. At 3326 South Main.

Q. That is what we call the smoke shop, is it?

A. That's right.

The Court: How much prior to the 14th?

Mr. Neblett: I will ask him, your Honor.

Q. How long before the 14th was that?

A. Oh, about 12 days.

Q. Was there anyone else present when you were talking to him?

A. No, because he asked me to come outside.

Q. You said you saw him in the smoke shop. Was that in front of the smoke shop?

A. I was on the inside when he came, and he told me to [294] come on the outside, he wanted to speak with me a minute.

Q. Did he drive up in a car and call you out?

A. Yes, he drove up in his car.

Q. And called you out?

A. Yes.

Q. Did he walk in the shop and ask you to come out?

A. Yes, sir.

Q. What did Fletcher say to you at this time?

(Testimony of Eugene Rayson.)

Wait a minute. Was there anyone else present when he was talking to you except you and Fletcher?

A. No.

Q. Tell us what happened at that conversation? What was said by him and by you?

A. Well, he told me that he was in a little tight and told me that he went out the night before to a black-jack game and he got broke and had pawned his pen and ring to some fellows that he didn't want to have them, and he asked me if I would let him have \$50 to get them out, that he had all the money but the \$50 to get the ring, and he would give it back to me in about eight or nine days.

I told him I didn't have it with me. I told him I had my car payment money at home and I would let him have it if he would have it back by the 15th, because that is when my car payment was due.

Q. You were buying a car on payments? [295]

A. Yes, sir.

Q. What were your payments a month?

A. \$84.53.

Mr. Jensen: I object to this.

Q. (By Mr. Neblett): You told Fletcher you were buying this car on payments?

Mr. Jensen: I object to this as being leading. Let the witness state what the conversation was.

The Court: Well, I think it is leading.

Q. (By Mr. Neblett): Did you have a discussion with Fletcher about your car payment?

A. That was the only discussion we had. I told him I had the money to make my car payment due

(Testimony of Eugene Rayson.)

on the 15th, and he told me he would give it back to me before my car payment was due.

Q. When did you next hear from him?

A. I heard from him on the 14th.

Q. Did he call you or did you call him?

A. He called me.

Q. Do you know where he was when he called you?

A. No, I don't know where he was.

Mr. Jensen: Object to that.

Q. (By Mr. Neblett): Did he say where he was when he called you?

Mr. Jensen: I object to that. I understand the witness [296] to say he called Fletcher.

The Witness: No.

Mr. Neblett: No.

Mr. Jensen: Then I am mistaken. I am sorry. Could I have the prior answer?

(Answer read.)

Mr. Jensen: I am sorry. I misunderstood.

Q. (By Mr. Neblett): Speak up a little bit, will you, Mr. Rayson? A. Okay.

Q. Do you remember what time of the day it was when he called you?

A. On the day of the 14th?

Q. Yes.

A. It was around 4:00 o'clock.

The Court: In the afternoon?

The Witness: In the afternoon.

Q. (By Mr. Neblett): What did he say?

A. He called and he said, "Hello."

(Testimony of Eugene Rayson.)

And I said, "Hello."

Then he said, "You know who this is?"

I said, "No. Who is it?"

He said, "It's Norman."

Then I said, "Man, I'm sure glad you called, because tomorrow is the day for me to pay my car note." [297]

He said, "Okay. I'm ready."

I said, "Where are you?"

He said, "I'm on 56th Street."

I said, "I'm going home now. I will meet you at 56th and Broadway."

He said, "Okay."

Then I drove from Jefferson and Main to 56th and Broadway, turned to my right. He wasn't there——

Q. Just a minute until I cover that with a question. You told us all the telephone conversation now that you had with him before you said that you would meet him at 56th and Broadway?

A. That's right.

Q. You told him you were going home?

A. That's right.

Q. Where did you live?

A. I lived at 97th Street.

Q. 97th and what?

A. 97th Street, east of Avalon.

Q. Did you say you would meet him on the way home at 56th and Broadway?

A. Yes. I told him I was going home and I asked him where was he, and he said he was on

(Testimony of Eugene Rayson.)

56th Street, and I said meet me at 56th and Broadway, because that was on my way home.

Q. What did you do then after you talked to him? [298]

A. Then I left to meet him there at 56th and Broadway.

Q. You left and drove to Broadway and 56th?

A. Yes.

Q. What did you do then?

A. When I got to 56th and Broadway, I turned to my right and he wasn't there. So then I turned around in the middle of the block and came back to the corner, and when I was almost to the corner, then he turned the corner coming from the south, and he turned the corner to the left and he stopped. and I got out of my car and walked over to his car.

Then I asked him, "How's everything?"

He said, "Oh, they treat me pretty rough," and then he gave me my money and I got in my car and went home.

The Court: How much money did he give you?

The Witness: \$50 he borrowed from me.

Q. (By Mr. Neblett): Did you get in his car?

A. No.

Q. Just walked up to the——

A. Just walked up to the driver's side.

He had the window open or the door open?

A. The windows were down.

Q. The windows were down? A. Yes.

(Testimony of Eugene Rayson.)

Q. Did you have any conversation with him at that time?

A. No, only just, "How are you," and "How is everything?" [299] He said, "They are treating me pretty rough." That's all.

Q. Have you seen him from that date to this until we came to court? Have you seen Fletcher since then? A. No.

Q. That is the last time you saw him?

A. That's right.

Q. Until, of course, we got in court here and you saw him? A. Until yesterday.

Q. You have already testified, as I understand it, that Mr. Kelley did not give you any number and particularly didn't give you Pleasant 1-6408, is that right? A. That's right.

Q. Did you ever at any time call Pleasant 1-6408? A. No.

Q. Did you ever at any time call Fletcher?

A. No.

Q. On the telephone at any place?

A. No.

Q. The only telephone conversation you had, then, I understand you, is the one you had with him on the 14th of September when he called you and you made an arrangement to meet him at 56th and Broadway, is that right?

A. That's right. [300]

Q. You have no other telephone calls at all that you had? A. No.

Q. At this conversation that you had with

(Testimony of Eugene Rayson.)

Fletcher when he called you at the smoke shop, was anything said about narcotics? A. No.

Mr. Jensen: I object. Is there any evidence in the record of a telephone conversation at the smoke shop?

Mr. Neblett: His testimony.

Mr. Jensen: No. He has talked about in person.

The Court: No. It was in person at the smoke shop.

Mr. Neblett: If I haven't asked him that, I will ask him.

Q. When you said a while ago that Fletcher called you in the afternoon of the 14th of September, he called you at the smoke shop, did he not?

A. That's right.

Mr. Jensen: All right.

Mr. Neblett: That's what I understood him to say.

The Court: All right.

Q. (By Mr. Neblett): That is when the arrangement was made to meet him at 56th and Broadway? A. That's right.

Q. When you left the meeting with Fletcher at 56th and [301] Broadway, where did you go?

A. I went home.

Q. Where is home again?

A. 624 East 97th Street.

Q. Do you have a housekeeper or somebody that lives there with you? A. Yes, sir.

Q. Who is that? A. Larue Williams.

Q. Was she there that night? A. Yes.

(Testimony of Eugene Rayson.)

Q. Did you eat dinner at home?

A. Yes, sir.

Q. Did she cook for you? A. Yes, sir.

Q. Where did you go that evening after you got home?

A. I stayed home that night. I did not go anywhere.

Q. Did you go out at all? A. No.

Q. What time did you arrive home?

A. I got home between 4:30 and 5:00.

Q. That is after you left 56th and Broadway?

A. That's right.

Q. Did you stay there all night?

A. That's right. [302]

Q. What do you have there? A house?

A. Yes, sir.

Q. How long have you had this house?

A. November last year.

The Court: May I ask a question?

Mr. Neblett: Yes, your Honor.

The Court: You got this \$50 from Fletcher on the afternoon of the 14th?

The Witness: Yes, sir.

The Court: When did you make your car payment?

The Witness: I made it the next morning.

The Court: Where did you make it?

The Witness: At the Bank of America.

The Court: Whereabouts?

The Witness: On 110th and Main.

The Court: I would like to have it verified

(Testimony of Eugene Rayson.)

whether or not he made that. Have you got any evidence here?

Mr. Neblett: We have it here, your Honor. Your Honor please, pardon me. I put it in the file here myself, the car payment book, but I can't find it right now, but we will get it if you give us a minute.

The Court: Maybe you can find it while the government is cross examining, if you are through with this witness. Have you any other questions?

Mr. Neblett: I was going to ask him one question. [303]

Q. Where was the car financed? With the Bank of America? A. Yes, sir.

Q. And you made that payment at—do you remember the branch? A. 110th and Main.

Mr. Neblett: We will find it, your Honor, but he can go ahead with his cross examination.

Cross Examination

Q. (By Mr. Neblett): Mr. Rayson, how long have you lived at 624 East 97th Street?

A. Since November last year.

Q. November of 1954? A. That's right.

Q. Did you say you have a housekeeper down there? A. Yes.

Q. What is her name? A. Larue Williams.

Q. Larue Williams? A. Yes.

Q. Does she prepare your meals down there?

A. Yes, sir.

Q. I thought you testified a little earlier that

(Testimony of Eugene Rayson.)

you had dinner most every evening at Mr. Kelley's cafe on East [304] Sixth Street.

A. No. That was when I first met him. He asked me that.

Q. When did you give up that practice?

A. August of 1954.

Q. After that you didn't eat there any more except occasionally? A. Not regularly.

Q. Not regularly. Now, let me ask you——

Mr. Neblett: Your Honor, may one of us be excused to call my secretary to see where I put this payment book?

The Court: All right.

Mr. Jensen: May I continue?

The Court: Go ahead.

Q. (By Mr. Jensen): Did you see Mr. Fletcher during the month of August 1954?

A. The month of August? Well, if I did, it was the last two or three days in August.

Q. Is that the occasion of his talking to you about a loan? A. That's right.

Q. Other than that occasion, did you see him at all during the month of August? A. No.

Q. Did you talk to him on the telephone? [305]

A. No.

Q. Do you ever recall an occasion when he was driving down the road in August or thereabouts when you waved to him and he waved to you? You were on the street?

A. That was at 56th and Long Beach. I remember seeing him passing the street.

(Testimony of Eugene Rayson.)

Q. You do remember that. Will you fix the time of that?

A. I don't know. That was before he asked me about the loan.

Q. That was before the loan? A. Yes.

Q. Could it have been in August?

A. Possibly.

Q. Prior to that had you seen him in July or June or May 1955? A. No.

Q. All right. Now, what time of day was it when he spoke to you about borrowing some money?

A. It was around 5:00 o'clock that afternoon.

Q. That, you said, was about 12 days prior to September 14th. A moment ago I think you stated it might have been in the latter part of August.

A. Yes.

Q. The last part of August or first part of September. [306] A. That's right.

Q. Is that the time of that conversation?

A. It must have been the last part of August, because it was before Labor Day.

Q. Did you see him or talk to him again between that date and the afternoon of September 14th when he paid this money back to you? Did you either see him or talk to him by phone?

A. What date now?

Q. From the time he borrowed the money until the day he paid it back.

A. I didn't see him from the time he borrowed it until he paid it back.

Q. Did you have any telephone conversations in

(Testimony of Eugene Rayson.)

that interval between when he borrowed the money?

A. No.

Q. And the time he paid it back?

A. No.

Q. Other than the one where you set up the meeting for the payment of it back?

A. I don't understand what you mean by setting up a meeting.

Q. I will rephrase the question. Prior to his paying the money back, you had a telephone conversation with him, did you not? [307]

A. Before he paid the money?

Q. Yes. A. Yes, on the 14th.

Q. You have testified, as I recall, that that telephone conversation occurred at approximately 4:00 p.m. in the afternoon on September 14th.

A. Around 4:00, yes, between 4:00 and 4:30.

Q. You later testified you got home between 4:30 and 5:00. A. That's right.

Q. Other than that telephone conversation, have you had any other telephone conversations with Mr. Fletcher since August of this year?

A. No.

Q. You didn't call him at 10:00 o'clock in the morning on September 14th? A. No.

Q. You didn't call him around noon of September 14th? A. No.

Q. You didn't call him later around 6:30 on September 14th? A. No.

Q. Did you meet him on Hoover and 58th Street? A. No.

(Testimony of Eugene Rayson.)

Q. Let me finish the question. On September 14th in [308] the forenoon, some time prior to noon?

A. No.

Q. You did not? A. No.

Q. What kind of car do you own?

A. It is a green Mercury Montclair.

Q. 1955 Montclair model?

A. That's right.

Q. Were you driving it on the 14th?

A. Yes, sir.

Q. You had it in your possession all that day?

A. Yes, sir.

Q. Didn't loan it to anybody? A. No.

Q. It was never missing at any time during the day so far as you know?

A. So far as I know, no.

Q. Did you have a meeting with Mr. Fletcher at approximately 1:00 or 1:30 in the afternoon on Main Street or in the vicinity of Main Street and 57th?

A. When?

Q. On September 14th at about 1:30 p.m. in the afternoon?

A. No.

Q. Did you have a meeting with him at any time around [309] that hour?

A. The only meeting I had was the one I told you about between 4:00 and 4:30.

Q. You have testified, I believe, you did not call him at 6:30 p.m. on September 14th?

A. I did not.

Q. Now, Mr. Rayson, do you fix the date of

(Testimony of Eugene Rayson.)

September 14th in your mind because it was prior to your car payment becoming due?

A. That's right.

Q. What did you make this payment with, cash, check, or otherwise? A. Cash.

Q. Do you recall the denomination of the bills, what they were?

A. \$84.53. I don't remember the bills.

Q. Do you recall what kind of money it was that Fletcher gave you at 4:00 p.m.?

A. He gave me \$50.

Q. Do you recall what money? I'm sorry. Was it all in bills? A. Yes.

Q. Several bills?

A. Well, I can't remember if there were tens or fives.

Q. But there were several of them? [310]

A. It amounted to \$50. There possibly could have been a ten and a twenty. I know he gave me \$50.

Q. Have you ever had any conversations with Mr. Farrington? A. Have I?

Q. Yes.

A. None other than when they arrested me.

Q. You don't recall you ever talked to him on any other occasion?

A. When they arrested me, that is the only time.

Mr. Neblett: If your Honor will excuse me just a minute, we have located the missing payment

(Testimony of Eugene Rayson.)

book. My secretary will have it here in a few moments.

Q. (By Mr. Jensen): This smoke house where you do business—is that what you call it?

A. Recreation center.

Q. Recreation center. Where was that again, please?

A. 3326 South Main Street.

Q. 3326 South Spring?

A. M-a-i-n, Main Street.

Q. South Main. My ears are playing tricks on me. I'm sorry. When did you go to work? When did you first arrive at that location on the 14th, do you recall?

A. The time of day?

Q. Yes, what time of day did you first get there? [311]

A. I got there about 12:00 o'clock.

Q. Where had you been prior to that time?

A. Home.

Q. Is it correct, then, that you left home some time just before noon and drove directly to this place at 3326 Main?

A. That's right.

Q. Did you remain there until you received this telephone call from Fletcher a little prior to 4:00 p.m.?

A. Well, I was in and out.

Q. When you left, did you leave on foot or did you move your car?

A. I did not move my car, no.

Q. In other words, you left your car there from when you arrived at 12:00 until you left to meet Mr. Fletcher at 56th and Broadway, is that right?

A. That's right.

(Testimony of Eugene Rayson.)

Q. You left your car there all that time?

A. No. My car wasn't parked in front of the place.

Q. Wherever you put your car, it was there from 12:00 to 4:00 p.m., is that right?

A. No, that is not right. Let me tell you what happened. I stopped off to get a wash.

Q. What time was that?

A. On my way up there to the shop. [312]

Q. You mean in the morning?

A. Around noon time, and I left it to get it washed, and I went back to get it and drove it in front of the place.

Q. What time was it you left it off to be washed?

A. On my way up to the smoke shop.

Q. Would that be around noon?

A. That's right.

Q. What time did you pick it up?

A. Oh, about 3:00 o'clock, 2:00 or 3:00 o'clock.

Q. When you picked it up at 3:00 o'clock, where did you take it?

A. In front of the place.

Q. In front of the recreation hall?

A. That's right.

Q. Then some time prior to 4:00 o'clock, you got in your car and drove down to 56th and Broadway, and from there you drove on home, is that correct?

A. That is correct.

Q. You were driving the same car?

A. That's right.

(Testimony of Eugene Rayson.)

Q. Did your car stay at your house all that evening? A. Sure.

Q. Didn't loan it to anybody? A. No.

Mr. Jensen: I don't believe I have any further questions. [313]

Mr. Neblett: I don't believe we have any re-direct.

The Court: You may step down.

(Witness excused.)

The Court: Do you have any other testimony?

Mr. Neblett: No, your Honor.

The Court: Except this book?

Mr. Jensen: I will agree counsel can put the witness back on the stand for the purpose of identifying the exhibit.

The Court: If you have the car payment book here, I suppose that's pretty good evidence a payment was made. Do you have any other testimony?

Mr. Jensen: Have the defendants rested?

The Court: Yes, they have rested.

Mr. Jensen: I would like to call Sergeant Landry.

The Court: All right, Sergeant.

ALGY F. LANDRY

called as a witness by and on behalf of the government in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Take the stand and state your name, please.

The Witness: Algy F. Landry. A-l-g-y. [314]

Direct Examination

Q. (By Mr. Jensen): Will you state your full name? A. Algy F. Landry.

Q. What is your occupation, Mr. Landry?

A. I am Deputy Sheriff assigned to the Sheriff's Narcotics Squad, Los Angeles County.

Q. How long have you been employed by the Sheriff of Los Angeles County?

A. Approximately nine years.

Q. Are you acquainted with the defendant Rayson? A. Yes, sir, I am.

Q. What is the date of the first time that you recall having seen him?

A. Having met him was on March 10, 1955.

Q. Other than meeting him, had you seen him before and known him? A. Yes, sir, I had.

Q. For how long a period of time?

A. A short time prior to that date.

Q. I call your attention to September 14, 1955. I will ask you whether or not you saw the defendant Rayson on that date.

A. Yes, sir, I did.

Q. Would you state what time of day it was that you [315] first saw him?

(Testimony of Algy F. Landry.)

A. I first saw Mr. Rayson at approximately 10:25 a.m. on the morning of September 14, 1955.

Q. And where?

A. As he came out of his location, 624 East 97th Street.

The Court: What do you mean by location?

The Witness: His house at that location.

The Court: His house?

The Witness: Yes.

Q. (By Mr. Jensen): How far away were you at that time?

Mr. Neblett: If your Honor please, we object to this on the ground it is not proper redirect examination.

Mr. Jensen: This is rebuttal, your Honor.

The Court: Not only that, but I suggested that they do not call these witnesses when they were presenting their main case because I thought maybe it would be cumulative. You can go ahead. I will overrule the objection.

Q. (By Mr. Jensen): You saw him at 624 East 97th Street, is that your answer? A. Yes, sir.

Q. How far away were you at the time you saw him?

A. Approximately a half block east on 97th Street.

Q. Were you in the company of anyone else at that time? A. I was by myself. [316]

Q. What did you do after you first saw him? What happened?

A. I observed Mr. Rayson come out of that

(Testimony of Algy F. Landry.)

house at that location, enter a 1955 Mercury, green in color, and he backed out of the driveway. This car was, incidentally, in the driveway. Backed out of the driveway and proceeded north on——

Q. Not too much detail. Did you follow him?

A. Yes, sir.

Q. And how far did you follow him? Did you ever observe him stop?

A. No, sir, except for traffic signals.

Q. Did you ever see him alight from his vehicle? A. No, sir, I did not.

Q. For what period would you say you followed him?

A. I followed him approximately 15 minutes and then I lost him.

Q. Where were you at the time that you lost him?

A. I lost him near Budlong and Slauson, in that vicinity.

Q. That would be, then, at approximately what time?

A. I lost him approximately 10 minutes to 11:00.

Q. A.m.? A. In the morning, a.m.

Q. Did you have the occasion to see the defendant [317] Rayson again that day?

A. Yes, sir, I did.

Q. When was that?

A. That was approximately 11:00 a.m., 10 minutes later, I observed Mr. Rayson.

Q. Where was he at the time that you observed him on that occasion?

(Testimony of Algy F. Landry.)

A. He was sitting in Mr. Fletcher's car at that time.

Q. Where?

A. The car was facing east on 57th Street, which would be on the south side of the street, in between Hoover and Broadway.

Q. How far were you away from the defendant Rayson on that occasion?

A. I was just across Hoover, approximately a half block.

Q. Did you have any difficulty seeing him at that time?

A. No, sir. I used visual aids, binoculars.

Q. What power were those binoculars?

A. They were 8 by 35 power, or whatever that means.

Q. Have you an estimate in feet as to the distance you were away from him at that time?

A. I would say approximately—I would say 100 yards or approximately 300, 400 feet. [318]

Q. Did you keep him under observation for some time?

A. For a short time after he re-entered his car.

Q. How long in total time?

A. Approximately two minutes after he re-entered his car and started up.

Q. I think you misunderstand me. From when you first saw him on 57th just off Hoover until you last saw him, what was the lapse of time?

A. I would say approximately five minutes.

Q. Did he leave that vicinity in his vehicle?

(Testimony of Algy F. Landry.)

A. Yes, sir, he did.

Q. Did you attempt to follow him?

A. Yes, sir, I did.

Q. Did you in fact follow him for a ways?

A. I followed him a short ways, sir.

Q. Would you tell us approximately how long you followed him on that occasion?

A. After he left this location, Mr. Rayson proceeded east on 57th Street, made a right turn on to Hoover, proceeded to Slauson, made a right turn on Slauson going—that would be west on Slauson, and made a left turn, I believe it was, at Broadway, at which time I was approximately one block behind him, and I missed the signal, and that is the last time I saw Mr. Rayson. He had turned into Broadway and was going south on Broadway. [319]

Q. Did you have occasion to see him at a later time on that same date, September 14th?

A. Yes, sir, I did. Pardon me. Let me say no, sir, I don't believe I saw him again that date, on the 14th.

Mr. Jensen: I don't believe I have any further questions.

The Court: May I ask a question?

Mr. Jensen: Yes, certainly you may.

The Court: Did you see Rayson on the 15th?

The Witness: No, sir. I didn't see Rayson on the 15th.

The Court: You are positive you saw Rayson in Fletcher's car at approximately 11:00 o'clock on the 14th?

(Testimony of Algy F. Landry.)

The Witness: Yes, sir, I did.

The Court: No doubt in your mind?

The Witness: No, sir, there isn't, your Honor I can give you the license number of the car. I took it down.

The Court: Speak up louder so the people can hear you. They all have a right to hear.

The Witness: 2 Z 45681 was the license number of the car.

Mr. Jensen: May I ask an additional question?

The Court: Yes.

Q. (By Mr. Jensen): Did you check that license out with the registration? A. Yes, sir.

Q. Did you determine the ownership of it?

A. Yes, sir, I did.

Q. To whom was it registered?

A. Eugene Rayson.

The Court: Cross examine.

Cross Examination

Q. (By Mr. Neblett): Sergeant Landry, I understood you to say there were two occasions on which you saw Eugene Rayson on the 14th, two occasions. A. I think I stated one.

Q. I thought you said you had seen him twice on that day. Am I mistaken?

A. Oh, yes, sir. It was twice.

Q. The first time you saw him, where was it? I didn't quite get it.

A. The first time I saw him was as he came out of a house on 97th Street.

(Testimony of Algy F. Landry.)

Q. Do you remember the number of that house?

A. It is 624, I believe, sir, East 97th.

Q. What? A. 624 East 97th.

Q. Where did he go from there?

A. He proceeded north on 97th Street.

Q. What time of the day was this? [321]

A. It was exactly 10:25 a.m. in the morning.

Q. How far did you follow him?

A. I proceeded behind him between varying degrees, if I got a car, a block or a block and a half behind him.

Q. How many miles did you follow him before you lost him?

A. Myself? I would estimate, rough estimation, about four miles.

Q. You lost him in the area of where?

A. Budlong and Slauson.

Q. What do you mean by that, the area?

A. That is the vicinity, sir, where I lost him.

Q. You know when he left. How far did you follow him? What street were you on, what number?

A. I had turned off, sir, onto Budlong, going north on Budlong one block south of Slauson. Mr. Rayson was crossing the car tracks north on Budlong, and that is where I lost him. That is the last time I saw him at the time.

Q. You saw him right on the corner of Budlong and Slauson, then, is that right?

A. He had crossed the railroad tracks which were on the north side of Slauson.

Q. Did you stop then and turn around and go

(Testimony of Algy F. Landry.)

back, or did you keep on up Budlong looking for him? A. I was looking for him. [322]

Q. Did you look around in that area from around Budlong and Slauson?

A. Yes, sir. I crossed where I had last seen him proceeding north up to 54th Street and made a right turn on 54th Street back to Hoover, and I patterned the streets by going up and down various streets in that location.

Q. You couldn't see him any more?

A. Yes, sir, I did.

Q. Where did you see him?

A. I saw him parked on 57th Street between Hoover and Broadway. His car was facing east on—that would be on the south side of the street.

Q. What location had you gone to pick him up? When you started out to find him, what location had you left? Had you left Mr. Richards' house?

A. I had been to Mr. Richards' house earlier in the day, and then I went over to Mr. Rayson's house, and I was staked out at that location.

Q. You knew, then, where Rayson lived, did you? A. Yes, sir, I did.

Q. Did you know the telephone number?

A. No.

Q. You knew it was in the book, didn't you?

A. I don't recall if I have ever seen it in the book.

Q. What time did you leave Mr. Richards' house on the [323] morning of September 14th?

A. Oh, approximately 9:00, 9:30.

(Testimony of Algy F. Landry.)

Q. You went over and staked out at Rayson's house? A. Yes, sir, I did.

Mr. Neblett: That's all.

Mr. Jensen: I have no further questions.

Mr. Neblett: If the court please, we have the book here.

The Court: Let's wait until we get this other witness here. You may step down.

(Witness excused.)

Mr. Jensen: Mr. Farrington, will you resume the stand?

WILLIAM R. FARRINGTON

called as a witness by and on behalf of the government in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Jensen): You understand you are still under oath in this matter? A. I do.

Q. During the months of August and September of 1955, will you state to the court on how many separate dates you observed the defendant Kelley in conversation with Norman Fletcher?

A. During August and September? [324]

Q. I mean including both August and September. A. On two separate occasions, sir.

Q. On two separate occasions? A. Yes, sir.

Q. I am going to ask you whether or not one of those occasions was August 22. A. It was.

(Testimony of William R. Farrington.)

Q. Were you present when they met on September 13th? A. I was.

Q. And what about September 22?

A. I was. Three separate occasions.

Q. Three occasions?

A. Three occasions, yes, sir.

Q. In all three of those meetings, were you in the company of Mr. Richards? Did you travel in the same vehicle?

A. As I recall, no sir. On the 13th we parted company and I took Fletcher and Landry, and Fletcher and I went and we installed this recording device.

Q. Going back to August 22, where were you located at the time you saw both Fletcher and Kelley?

A. Directly across the street there is a phone booth.

Mr. Neblett: Your Honor, this witness has gone all over this.

Mr. Jensen: No, your Honor. He testified to one item only, and that was what he heard on the telephone conversation. [325]

The Court: Overruled.

Q. (By Mr. Jensen): Where were you located at the time you observed him on August 22?

A. Directly across the street from the La Jolla Cleaners there is a phone booth. It is a little to the west of there, but you are able to look into the cleaners from that position.

Q. Were you in that phone booth at that time?

(Testimony of William R. Farrington.)

A. I was for a while.

Q. What would you estimate to be the distance from there to the cleaners?

A. A city street.

Q. I want an estimate of the distance.

A. It is approximately 50 feet, I should say.

Q. Did you have any visual aid at the time you were observing from there?

A. At that time I did not.

Q. At any other time on that meeting did you use a visual aid?

A. At that meeting, no, it was not necessary.

Q. Calling your attention to September 13th, did you observe Kelley in the presence of Mr. Fletcher on that date?

A. Yes, sir, I did.

Q. Where were they at that time?

A. They were in the cleaners at that time. [326]

Q. Where were you?

A. I walked down Sixth Street at that time.

Q. Did you look in the cleaners as you went by?

A. Yes, I did.

Q. How many times did you pass the cleaners on foot?

A. One time.

Q. Calling your attention to September 22, 1955, did you see Kelley, the defendant Kelley, and Norman Fletcher in each other's presence on that day?

A. Yes, sir, I did.

Q. Did they appear to be conversing?

A. They did.

Q. Where were they located at that time?

(Testimony of William R. Farrington.)

A. They were in front of the La Jolla Cleaners at that time.

Q. Was Mr. Kelley sweeping the street?

A. He was.

Q. Did they appear to be engaged in conversation? A. They did.

Q. Will you give us your estimate of the duration of that conversation?

A. Approximately, I should say three or four minutes.

Q. Did Mr. Fletcher just pause and go down the street or, you say, three or four minutes?

A. Yes. [327]

Q. Where were you located at the time you observed this conversation?

A. One block east in a vehicle.

Q. Did you use any visual aid at that time?

A. Yes, sir.

Q. What did you use?

A. The regular visual aids provided by the Sheriff's Department, Bausch & Lomb, 7 by 35 binoculars.

Q. You used a pair of 7 by 35 binoculars?

A. That is correct, sir.

Q. Directing your attention to September 14, 1955, in the morning hours of that day did you have occasion to see the defendant Rayson on that occasion? A. Yes, sir, I did.

Q. Where did you first see him on that date?

A. I first observed him driving north on Hoover.
The Court: What time of the day?

(Testimony of William R. Farrington.)

The Witness: That was approximately 11:00 p.m.

The Court: P. m?

The Witness: A. m. Excuse me, sir.

Q. (By Mr. Jensen): He was driving a vehicle?

A. He was.

Q. Do you recall the make and model of the vehicle? A. Yes, sir, I do.

Q. What was it? [328]

A. 1955 Mercury, Montclair coupe, green in color.

Q. How long was he within your vision on that occasion?

A. He was in my vision on two separate occasions there. He turned the corner. He was out of my vision for approximately 30 seconds.

Q. Now counting the 30 seconds, what was the total time you would say you had him under observation? A. Close to 20 minutes.

Q. During that 20 minutes did you move from position to position or did you stay fixed in one spot?

A. I moved one time from Hoover to 57th Street.

Q. What was the closest point that you reached to Mr. Fletcher on that occasion?

A. One block away, a short block.

Q. Can you give us an estimate of the distance?

A. 100 yards.

Q. Did you use any visual aids to observe him on this occasion? A. I did.

Q. Would you state what they were?

A. The regular visual aids provided by the

(Testimony of William R. Farrington.)

Sheriff's Department, Bausch & Lomb 7 by 35 binoculars.

Q. Did you have occasion to see Mr. Fletcher again at a later time that day?

A. Yes, sir, I did. [329]

Q. Again we are still speaking of September 14, 1955? A. Yes.

Q. Would you say the time and place you saw him?

A. Mr. Fletcher was in our company.

Q. I am sorry. I misspoke myself. The defendant Rayson, did you see him again on September 14th? A. Yes.

Q. Would you state the time and place you saw the defendant Rayson?

A. It was shortly after noon, approximately 12:30, quarter to 1:00 o'clock, as I recall, on 58th and just approximately 75 to 100 feet west of Main Street.

Q. How far away were you when you observed him on that occasion?

A. I was an equal distance west of the defendant at that time.

Q. You say 75 feet then?

A. 75 to 100.

Q. Was the defendant Rayson at any time in the presence of Norman Fletcher on that occasion?

A. He was.

Q. Did they appear to be in conversation?

A. They did. I would like to make a correction. I would say 75 to 100 yards. Excuse me.

(Testimony of William R. Farrington.)

Q. Did you use any visual aid on that occasion to observe [330] these two men?

A. I did, sir.

Q. Were they the 7 by 35 binoculars again?

A. They were.

Q. And 7 by 35 is a 7 power binocular, isn't it?

A. It is.

Q. It will reduce 70 yards to 10 yards, will it not? A. Approximately.

Q. And an 8 by 50 binoculars will reduce 80 yards to 10 yards, or 800 feet to 10 feet?

A. Yes, sir.

The Court: Do I understand at 12:30 you saw Rayson and Fletcher there?

The Witness: It was approximately that time. It was after the noon hour, when we received a call at approximately 12:00 o'clock—

Q. (By Mr. Jensen): Keep your voice up.

A. It was approximately a half hour to 20 minutes, as I recall it, after the call was placed from Rayson at approximately 12:00 o'clock when he directed Fletcher to come to 58th and Main.

Mr. Jensen: Does your Honor have any further questions?

The Court: No.

Mr. Jensen: I have one or two other questions.

Q. In the afternoon of September 15th at approximately [331] 3:00 or 3:30 p.m., did you accompany Mr. Richards to the place of residence of Norman Fletcher? A. On the 15th?

Q. On the 14th. A. You said the 15th.

(Testimony of William R. Farrington.)

Q. I beg your pardon. May I correct my question? On the afternoon of September 14th at approximately 3:30 p.m. in the afternoon, did you accompany Mr. Richards out to the residence of Mr. Fletcher? A. Yes, I did.

Q. Did Mr. Fletcher drive his own car?

A. He did.

Q. Approximately what time did he arrive at his residence?

A. I don't recall the exact time, sir.

Q. What is your best memory?

A. Approximately 4:00, close to 4:00.

The Court: Keep your voice up.

The Witness: Close to 4:00 p.m.

Q. (By Mr. Jensen): Did you observe Norman Fletcher leaving that vehicle at his residence?

A. Yes, sir, I did.

Q. Was his vehicle within your scope of observation at that time?

A. No, sir, it was not. He pulled into the garage and [332] I saw him walk out of the garage into the yard.

Q. When was the next moment that you saw Fletcher?

A. Approximately an hour or an hour and 15 or 20 minutes from the time we first arrived.

Q. That would be somewhere around 5:00 o'clock to 5:15.

A. Close to 5:00, yes, sir.

Q. Did he re-enter his vehicle at that time or re-enter the garage? A. He did.

(Testimony of William R. Farrington.)

Q. Did he drive away in his vehicle?

A. He did.

Q. Had that vehicle been moved during that time, would you have been able to observe it?

A. Yes, sir.

Q. Was it moved from the garage?

A. It was not.

Q. What is your memory as to the time when you returned to Mr. Richards' house after the meeting you observed between Fletcher and Rayson in the afternoon of September 14th? What time did you get back to Mr. Richards' house after that meeting?

A. After the meeting?

Q. After the meeting in the afternoon. That would be the one you testified to at Main and 57th or thereabouts, Main and 58th. [333]

The Court: He said about 12:30. Maybe that's the afternoon.

The Witness: I imagine it was approximately half an hour later.

Q. (By Mr. Jensen): Around 1:00 p.m.?

A. Yes.

Q. Did Mr. Fletcher leave your presence from 1:00 p.m. on that date, when you got back to Mr. Richards' house, did Mr. Fletcher leave your presence between 1:00 p.m. on that day, or your observation, either one, between 1:00 p.m. and the 4:00 o'clock when you saw him go in his house?

A. No, sir, he did not.

Q. He was either with you or under your observation during those hours?

A. He was.

(Testimony of William R. Farrington.)

Q. Did he make any other contact with the defendant Rayson? A. He did not.

The Court: After 4:00 o'clock, did you keep him under surveillance?

The Witness: Up until the time he left his home to go on this errand to pick up his girl friend, he was under surveillance.

The Court: He got back to the house at 4:00 o'clock?

The Witness: No. Approximately 6:10, 6:15.

Mr. Jensen: He means from picking up his girl.

The Court: What happened between 4:00 and 6:00 o'clock?

The Witness: He was under our surveillance that whole time.

The Court: I am sorry. You said he went back——

Mr. Jensen: There is a little mix-up.

The Court: All right. You straighten it out.

Q. (By Mr. Jensen): I asked you, between 1:00 p.m. and 4:00 p.m., and you said he was either under your surveillance or actually with you.

A. From 1:00 p.m. until the time we took him to his house.

Q. Then he entered his house and you did not actually see him for another hour or so.

A. That is correct.

The Court: Did you see the car?

The Witness: We could see the rear of the car in the garage.

The Court: You could see that?

(Testimony of William R. Farrington.)

The Witness: Yes.

The Court: You were watching the house, were you?

The Witness: We were in the alley, Agent Richards and myself.

Q. (By Mr. Jensen): The car was not moved?

A. The car was not moved. [335]

Q. Up until 5:00 p.m.

A. Up until 5:00 p.m., up until he left.

Q. You didn't observe him again after 5:00 p.m., is that correct? A. That is correct.

Q. Until around 6:00 o'clock when he rejoined you at Mr. Richards' house.

A. That is correct.

Mr. Jensen: I have no further questions.

Mr. Neblett: I don't think we have any cross examination.

(Witness excused.)

Mr. Jensen: I would like to ask one question of one witness more, your Honor.

The Court: All right.

NORMAN FLETCHER

recalled as a witness by and on behalf of the government in rebuttal, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Jensen): You understand you are under oath in this matter? A. Yes.

Q. I am going to ask you a question relative to

(Testimony of Norman Fletcher.)

three things. I want to know whether you made a telephone call to Rayson, you placed a call at any time on the 15th, or whether [336] or not you paid him back a loan—well, excuse me.

I want to know whether you made a telephone call to the defendant Rayson at any time on the 14th of September 1955, or whether at any time you paid him back money that you owed him on the 14th of September 1955.

Mr. Neblett: To which we object on the ground it is improper.

The Witness: I did not.

The Court: I am restricting him to one question.

Mr. Neblett: Very well. I will withdraw the objection.

Q. (By Mr. Jensen): What is the answer?

A. I did not.

Mr. Jensen: I have no further questions.

The Court: Anything else?

Mr. Neblett: That's all.

(Witness excused)

Mr. Jensen: I don't want to in any way derogate from the effectiveness of counsel's evidence, but I will stipulate to the book.

The Court: I thought these books were set up so that they would show a payment due on a certain date.

Mr. Jensen: They may be, but this one isn't.

Mr. Neblett: Pardon me, your Honor.

The Court: Go ahead and ask some questions about it. [337]

EUGENE RAYSON

recalled as a witness by and in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Neblett): Mr. Rayson, you bought this Mercury car. Where did you finance it?

A. Bank of America.

Q. You had financed it on a 36 payment plan at \$84.58 a month? A. That's right.

Q. Is this your payment book?

A. Yes, sir.

Q. Speak up. A. Yes, sir.

Q. That book shows you made two payments on the car. A. That's right.

Q. One was August 15 and the other was September 15, is that right? A. That's right.

Mr. Neblett: Your Honor please, I suppose we can just offer this in evidence.

The Court: You better not offer it in evidence. He may need it. [338]

Mr. Jensen: I will agree with counsel the court may examine the document. In fact, I will stipulate, if counsel desires, that on September 15th he made a car payment somewhere in the vicinity of \$80 to the Bank of America on 110th Street, or wherever it was made.

The Court: All right. I won't take the witness' word for it.

Q. (By Mr. Neblett): At any time on Septem-

(Testimony of Eugene Rayson.)

ber 14, 1955, Mr. Rayson, were you at Budlong and Slauson in the City of Los Angeles?

A. No, sir.

Q. Were you at any time in the vicinity of that street crossing? A. No, sir.

Q. On the 14th of September 1955?

A. No, sir.

Q. On the 14th of September 1955, did Norman Fletcher pay, hand or give to you \$700?

A. No, sir.

Mr. Jensen: I am going to object to this. I think this is the same thing he testified to on direct.

The Court: No, I don't believe he testified to \$700. Overruled. The answer was "No, sir."

Q. (By Mr. Neblett): Did he pay you any sum of money on September 14th other than the \$50 to which you have already [339] testified?

A. No, sir.

Mr. Neblett: That's all, your Honor.

The Court: Any questions?

Mr. Jensen: No questions.

The Court: You may step down.

Mr. Jensen: We have no further testimony.

Mr. Neblett: My co-counsel calls my attention to something else.

Q. You heard the testimony of one of the witnesses here, Fletcher's testimony, he gave you another \$700 on a day subsequent to September 15th. Did you hear that testimony? A. Yes, sir.

Q. Was any such money paid to you?

A. No, sir.

(Testimony of Eugene Rayson.)

Q. Fletcher didn't give you \$700 on September 14th or any other time? A. No, sir.

Q. Did he ever pay you any other sum of money other than \$50 at any time between August 22 and the day of the filing of this indictment? Did Fletcher pay you any sum of money, give you any sum of money, hand you any sum of money, other than \$50 to which you have already testified?

A. No, sir.

Mr. Neblett: That's all. [340]

Mr. Jensen: No questions.

The Court: You may step down.

(Witness excused.)

The Court: Do you rest?

Mr. Neblett: Yes, your Honor.

The Court: It seems to me that this case is going to have to be decided upon the question of the credibility of witnesses. Consequently, I am going to continue the case to 10:00 o'clock in the morning.

In the meantime, I wish counsel would review their notes so you can point out to me, if you can, the discrepancies in the testimony. You know, I have a lot of experience in discrepancies in testimony. I have been trying a number of Chinese cases. They all turn upon the question of discrepancy of testimony. I have been trying those cases for three years.

I wish you would review your notes of the testimony, and I have got some notes here, too. I have some matters that I want to call to your attention, but I will give you those in the morning. [341]

December 1, 1955, 10:00 o'clock, a.m.

The Clerk: No. 24,517 and 24,568, United States vs. Ollie W. Kelley and Eugene Rayson, further trial.

Mr. Neblett: Ready for the defendants.

Mr. Jensen: Ready for the government. May I inquire of the clerk whether all of the government's proposed exhibits have been admitted?

The Court: All the exhibits have been admitted, I think.

Mr. Jensen: I only had a question about No. 4, your Honor.

The Clerk: Yes, they are all admitted.

The Court: Are you ready?

Mr. Jensen: Yes.

The Court: All right. I am ready now to proceed in the Kelley case. There are a very few things I want to know in regard to this Kelley case.

Mr. Jensen: I didn't propose to review the evidence in my summation, your Honor, because I am sure you followed all the testimony that came in yesterday and the day before and no purpose would be served. There are a couple or three points I would like to make in my opening statement, and then perhaps give the time over to counsel for defense. Does your Honor care to pose any questions?

The Court: I was going to ask you a question.

Mr. Jensen: All right.

The Court: You know, if this wasn't a narcotics case, it would be much easier to decide than a narcotics case, because in a narcotics case, it is a case that is approached probably with a different point

of view. I said before, and I think possibly I am right, that this case is going to be decided upon the credibility of the witnesses.

Mr. Jensen: I believe so, your Honor.

The Court: The government's main witness is a three-time loser.

Mr. Jensen: That's right.

The Court: He comes into court impeached under the law.

The defendant Kelley is a one-time loser. He comes into court impeached under the law.

Of course, under those circumstances, I could disregard the testimony of either one of them, if I wanted to. The only evidence we have, and I want to know if I am correct, against Kelley is that Rayson went down and talked to him.

Mr. Jensen: Fletcher, your Honor.

The Court: Fletcher, that's right. Fletcher went down and talked to him. He went down first on the 22nd.

Mr. Jensen: Of August.

The Court: 22nd of August. He said nothing happened and he went back on the 13th of September, pretty near a month.

Now, Kelley said he only came down twice. Fletcher [344] said he went down three times. Well, I can understand there might be a legitimate mistake. I don't know. If somebody had asked me how many times they had been in my office, whether two or three or four or five, I couldn't tell. Just let me finish and then you can talk. There might have been a mistake.

Now, there was a conversation and Kelley said when he came down, he said he wanted to buy some stuff, and he said, "I don't want to talk about stuff. I am under probation. I have been instructed not to talk about it and I don't want to talk about it at all."

He was only there a few minutes. He came back on the 13th. Only there for a few minutes. We have two versions of the conversation, both by ex-criminals.

Mr. Jensen: We have a little bit more, your Honor.

The Court: I am talking about the conversation. You haven't anything on the conversation more, have you?

Mr. Jensen: That's right.

The Court: You don't know what has been said except from the testimony of these witnesses.

Mr. Jensen: That's right, your Honor.

The Court: Now, as far as I know, the only evidence in this case that connects Kelley with this conspiracy is the fact that the government's witness said that he gave Kelley a telephone number. [345]

Mr. Jensen: Yes, your Honor.

The Court: And later he was called by Rayson. He said he didn't give Rayson the telephone number. He said he gave Kelley the telephone number. As far as I know, that is the only positive evidence you have got against Kelley. What other evidence is there?

Mr. Jensen: I think that's it. There is one thing. Fletcher's statement is broader, your Honor please.

He said he gave no one else that number. September 13th in the morning Fletcher was given the number by Mr. Richards. He didn't have the number prior to that. All the testimony is to that effect. He was given the number just before he saw Kelley. To determine whether or not Fletcher may or may not be telling the truth about the conversation with Kelley on September 13th that morning for a moment, Fletcher said he told Kelley he would be at that number between 8:00 and 10:30 the following morning, and right on the nose at 10:15 in comes the telephone call.

The Court: That is the only positive evidence, as far as I know, you have against Kelley.

Mr. Jensen: It is substantial corroboration, though, of the Fletcher statement to Kelley.

The Court: Fletcher said he gave the telephone number to Kelley. Kelley says he didn't give the telephone number to him. [346]

Mr. Jensen: That's right.

The Court: Let's look at Fletcher's testimony. I don't know. You know, during the trial when Fletcher was on the stand, he had difficulty in answering questions, in following questions. I asked him if he had memorized what he was trying to say, because he was saying it over and over.

Mr. Jensen: I think that was Richards, your Honor.

The Court: Was it Richards?

Mr. Jensen: Yes.

The Court: I guess that's right, it was Richards.

Mr. Jensen: I don't think that was true of Fletcher.

The Court: Yes, that was Richards.

Mr. Jensen: He had a straightforward manner up there on the stand.

The Court: Isn't that the only definite evidence you have got against Kelley, is this telephone number?

Mr. Jensen: There is the subsequent conversation, your Honor, on the 22nd of September where this pattern followed exactly the same course.

The Court: But we don't have any testimony of what happened, what the conversation was about.

Mr. Jensen: If your Honor please, the pattern is identical, though. If you will recall, Fletcher went down and saw him on the morning of the 22nd, said he wanted to make an additional purchase. Your Honor may or may not care to believe that, [347] but consider just for a moment, immediately after that in the afternoon of the 22nd of September again, Rayson called on the phone and asked him if he wanted to see him, and they set up another meeting in the afternoon of September 22nd. That is two identical patterns. In each instance the witness Fletcher first contacted Kelley, and subsequently he was contacted by Rayson immediately afterwards, your Honor.

The Court: Mr. Neblett, what have you got to say about this Kelley episode? What is the evidence against Kelley?

Mr. Neblett: I don't know of any evidence ex-

cept what your Honor has outlined. I was going to say that I thought I believed Kelley's testimony to be true. He told him exactly what he said he did tell him. Besides that, there is another element which I think is terrifically important, and that is that this man Fletcher when he talked to him on two of these occasions so testified himself, he had on this recording instrument, and that recording instrument would have the conversations, and if it didn't carry what Kelley said it carried, they would have used it, your Honor.

The Court: I don't know. The testimony was that it wasn't turned on the first time. There wasn't anything on the tape. Of course, the testimony also was that as far as the second time was concerned, it was unintelligible. The witness said after listening to it two or three times, he could make it out. The first time he didn't get it. It was [348] unintelligible. If that was the case, I wouldn't admit it if it was offered.

Mr. Neblett: Your Honor, it should have been brought in anyway, and then the court could have determined whether it was unintelligible. I think the only reasonable hypothesis is that it didn't show what they testified to against Kelley.

The Court: I don't believe that the government would suppress evidence. I don't believe so. I have enough confidence in the United States Attorney's office that if that showed that there was no conversation relative to dope, heroin, narcotics, they would admit it.

Mr. Neblett: If your Honor please, I am not

charging this against the United States Attorney's office. I am charging it against the overzealous narcotics enforcement officers, because there is no information before the court, no information in our hands that the United States Attorney's office ever listened to it at all. I don't know that they ever did. Certainly there is nothing before the court to show that they ever listened to it.

I certainly am not charging them with suppressing evidence. I don't charge that for one moment.

But I do feel that with the testimony of Fletcher, that if that recording instrument had brought out testimony satisfactorily, that would have been the first thing brought in here. [349]

But coming back to what your Honor asked me, I don't see anything against Kelley at all except what your Honor has just outlined. The fact that Fletcher said Kelley gave to him a telephone number where Rayson could be reached, if your Honor will remember the testimony of Fletcher and of Rayson, it is that Fletcher had this telephone number all the time. He was a frequent visitor in the smoke shop over a period of time. Besides, the name was right there where he could see it in the telephone book, and it was on the telephone booth in the place. There was no occasion for Kelley to give him the telephone number because Fletcher already knew it.

The Court: I know, but I am talking about the telephone number that was given so that Fletcher could be called, not the telephone number to call the defendant Rayson, but the fact that I think

Fletcher testified he gave Kelley a telephone number where he could be reached.

Mr. Neblett: Yes, your Honor, but he never was called.

The Court: That is the telephone number I am talking about.

Mr. Neblett: Your Honor picked out that point that Fletcher went to see Kelley on the 22nd of August. 19 days later he came back. They hadn't heard a word from Kelley. There was no reason for his coming back unless he got nervous about what we think, what we believe the evidence shows, that this was a set deal by the agents to trap Kelley and Rayson, [350] to entrap them.

The Court: Well, Colonel, I disagree with you relative to entrapment. It may have been a set deal and it may have been a plan to see whether or not Kelley would sell narcotics if he had the opportunity. But I think it lacks a lot of the requirements of an entrapment. If I decide this case upon the question of entrapment, we wouldn't argue any more at all. We would decide it and have it over with.

Mr. Neblett: That is my view, the evidence shows that sort of a deal. I may be mistaken. You are talking about the telephone number of Richards?

The Court: That's right, Richards' telephone number.

Mr. Neblett: Which was said to be given on the second trip.

The Court: It was a secret number, unlisted number. According to the testimony, if I remember

correctly, Fletcher gave this number to Kelley. He says he didn't give it to Rayson, but Rayson the next day called him.

Mr. Neblett: Well, remember, your Honor, that Rayson also testified and Fletcher also testified that he was in contact with Rayson during that period. There was no need to ask Kelley for that number.

Mr. Jensen: I think that is a misstatement of the fact, your Honor. I think the record will show that the only occasion when Fletcher and Rayson were together was some time [351] about 12 days prior to the 14th of September when some money was borrowed, and that is Mr. Rayson's testimony.

The Court: Colonel, while I have got you there, I want to ask you a question relative to Rayson. Rayson testified very definitely relative to the 14th of September. He testified that he was over at the smoke shop. When he went home or started home, he denies seeing Fletcher, and yet we have these police officers who locate him with Fletcher. Why should I disbelieve the police officers' story? No question about it that Farrington said that he saw Rayson at 11:00 o'clock a.m. driving north on Hoover.

At 12:30 he saw him at 58th and Main with Fletcher.

Now, according to Rayson's testimony, he wasn't there at all. Why am I going to believe these police officers? If that is true, then how can I believe anything that Rayson said.

Mr. Neblett: Your Honor, the very fact that these men are police officers and in the narcotics

detail doesn't raise them to any higher grade than any other witness. We know very well in these narcotics cases that the zeal and energy for prosecution is so great that I feel their testimony just isn't true. I will tell you what is wrong with their testimony.

This has to do with one of the things that impressed me in the testimony, and I hope impresses the court. [352]

These police officers had Fletcher right with them all day long on Wednesday, on the 14th. They kept right with him. They followed him down once that that he was supposed to have given \$700 to Rayson. Of course, I don't believe he ever gave the \$700.

The Court: What happened to the \$700.

Mr. Neblett: Well, I think Fletcher still has it. I will tell you why I think that. You notice Richards testified he searched him carefully when Fletcher left to meet Rayson. He gave him \$860.

The Court: Gave Fletcher \$860 and Fletcher had no other money on him at all except the \$860.

Mr. Neblett: Yes. Then Fletcher went down and had a conference with Rayson. He came back about—well, say 3:40, I think the testimony is, that afternoon. He gave Richards \$160, but Richards did not search him nor his car.

Mr. Jensen: That is a misstatement of the record, your Honor.

Mr. Neblett: It is not, your Honor. I would like counsel to show me where there is another statement. He didn't search him or the car, and he allowed him to leave.

Mr. Jensen: That isn't so.

The Court: Now, just wait a minute. Let him finish his statement.

Mr. Jensen: I am sorry. [353]

Mr. Neblett: Richards allowed him to leave and go to Beverly Hills and pick up his girl friend. He was gone for two hours. Nobody knows where he was, except he said he was going to pick up his girl friend. That was right at the critical period when this important thing was going on. They let him go out and keep what we would call a social engagement. That is when he disposed of that money. He might have had it on his person for all they know, because they didn't search him upon his return or they didn't search his car.

The Court: That is an argument. There is no evidence he disposed of any money during that trip.

Mr. Neblett: There is no evidence he ever gave any to Rayson except the \$50 he owed him.

The Court: There is evidence \$700 was given him, or \$860.

Mr. Neblett: No, 700, your Honor. I believe the testimony of Fletcher is he got \$700. But if these police officers are telling the truth, why didn't they search him at the time he returned to see whether he had got rid of the \$700. Why didn't they search his car? Why did they let him go off and spend two hours? That is argument, but that is the circumstance in the case. It is our theory that is when that heroin was planted at the railroad sign, when he was out there. He had somebody else make these calls. I think the police officers are not entitled to belief when they say he had only [354] seen Rayson

about twice six or eight months before this time, and he could recognize his voice over the telephone. That is incredible.

The Court: Mr. Rayson testified on the stand that he was in the smoke shop and that Fletcher called him on the phone. I think he said he called at 4:00 o'clock in the afternoon. He hadn't seen Fletcher. He got in his car and he went home and met him down on the street where he was paid the \$50.

Now, according to Rayson's own testimony, he hadn't seen Fletcher up to 4:00 o'clock that afternoon.

Mr. Neblett: That's right.

The Court: And yet we have Sergeant Landry and we have Sergeant Farrington and we have Fletcher——

Mr. Neblett: And Mr. Richards.

The Court: Who?

Mr. Jensen: And Mr. Richards.

The Court: And Richards, who testify that Fletcher and Rayson were seen together at 12:00 o'clock, 11:00 o'clock, 12:00 o'clock. How are you going to reconcile that testimony?

Mr. Neblett: I just don't think it is true, that's all.

The Court: You think four people have come up here and agreed to something that isn't true?

Mr. Neblett: I think they will do anything, most anything. The way this case has turned out, I think they will testify to most anything to bring about a conviction. I feel [355] that way about it.

The Court: Well, you are representing your clients.

Mr. Neblett: Pardon me, your Honor?

The Court: You are representing your clients and you can feel that way, but I am not representing your clients. I am trying to look at the evidence as it has been presented to the court.

Mr. Neblett: Well, even so, your Honor, I do say that it is incredible that they would have known his voice, that these officers would have known his voice.

Of course, Fletcher told them it was Rayson who was calling, who was talking that afternoon at 4:00 o'clock. That is fully explained, I think, by the fact that Rayson does admit he was called by Fletcher in the afternoon about 4:00 o'clock, and he went down to 56th and Broadway and met him, and there Fletcher paid him the \$50 that he owed him.

Then he drove off and he didn't see him any more that day or hadn't seen him any more from that day to this.

The Court: But what about these meetings? What about this meeting at noon or at 11:00 o'clock? According to Rayson's testimony he was at the smoke shop then. He was not running around. He wasn't down there at 11:00 o'clock on North Hoover, or 12:30 at 58th and Main. He didn't see Fletcher at 58th and Main. Am I going to disregard the testimony of the officers? [356]

Mr. Neblett: If you believe it doesn't prove anything.

The Court: I don't know whether it proves any-

thing, except it throws some question upon the entire testimony of Rayson.

Mr. Neblett: That is true, your Honor, but supposing that all of Rayson's testimony is disbelieved, there is still not enough evidence in our opinion to convict him. The government hasn't made out a case.

The Court: How about picking up the stuff? No question that was picked up. The officers said it was picked up.

Mr. Neblett: I don't have any doubt that, but what is the connection between that and Rayson? Just to show the unreliability of the police officers' testimony, Sergeant Landry, I think it was, who pursued him that afternoon, said he pursued him to the crossing at Budlong and Slauson, the railroad crossing there, and lost him. That would have been very simple, to stay around there and see whether he planted it.

Mr. Jensen: That was in the morning at 11:00 a.m., long before the delivery.

Mr. Neblett: Was that in the morning?

Mr. Jensen: Yes, that was when he followed him from his home into town at 11:00 o'clock in the morning.

Mr. Neblett: I am sorry about that. I made a mistake. But it doesn't prove this case beyond a reasonable doubt even [357] if you disregard all of Rayson's testimony. The fact is there is no showing whatever that he had anything to do with the planting of that heroin, not any showing except some conversations Fletcher said he had with the man.

The Court: According to the evidence, he was paid \$700, and after being paid the \$700 Fletcher was told where to go to pick up the stuff, and he went and got it.

Mr. Neblett: He was told later that afternoon where to go and pick it up on the telephone. Fletcher and they went out and picked it up at 6:30. I wondered why somebody didn't take fingerprints off those packages. The government didn't take them.

The Court: I don't know whether you can off cellophane or not.

Mr. Neblett: You can off the paper bag. I think cellophane is one of the best.

The Court: I don't know.

Mr. Neblett: I believe so. But I wonder why they didn't see whether Rayson's fingerprints were on it or not. But there is no testimony about that.

If the court please, if you disregard the testimony of Rayson, there isn't anything to prove beyond a reasonable doubt that he got this. It is incredible that anybody, that Rayson would call him up and then plant that down there on the railroad track in broad daylight. I think the court will take [358] judicial notice of the fact that on September 14th we had daylight savings time in Los Angeles. The officers testified they picked this up between 6:00 and 6:30, as I recall it. At that time it still was daylight.

The Court: There is no question but what somebody put it there.

Mr. Neblett: No question about that.

The Court: And somebody put it there probably in the daylight.

Mr. Neblett: My estimate of the evidence is that I think this is a reasonable conclusion, that that two hours when Fletcher was gone, he put it there. In other words, he sold the government \$700 worth of heroin. He still has the money, if he hasn't spent it. That is what happened. Fletcher was gone for two hours. No one knows where he was. When he came back he got a telephone call from somebody who said, "Go down to the railroad track at Budlong and Slauson and pick it up."

That is the crux of this case, as we see it. It is all circumstantial evidence as to who put it there. This is a circumstance, his being gone for two hours.

The Court: Well, Colonel, I think there is sufficient evidence in the case to justify a finding of Rayson guilty. I think there is sufficient evidence in this case for that.

Mr. Neblett: Mr. Dudley calls my attention to the fact that Fletcher testified he had known Rayson since 1953, shortly [359] after he came back from the penitentiary, I think, and that he was a frequenter or visitor around the smoke shop run by Rayson. May he give his idea?

The Court: Yes, go ahead.

Mr. Dudley: I think Mr. Neblett is a little confused about the smoke shop and the telephone call. As I recall the testimony of Fletcher, he testified that Richards had given him this unlisted telephone number and that he had given that to Kelley.

The Court: That's right.

Mr. Dudley: That is the point we are talking about. Fletcher also testified that he had known Rayson since 1953, and as I recall, at least the inference is from the testimony, he had seen Rayson many times since 1953.

The Court: Yes, and he could have given this telephone number to Rayson.

Mr. Dudley: That's true. He could have got the telephone number off of Richards' telephone. That happens so often.

The Court: Yes, he could have done that.

Mr. Dudley: So there is no connection with Kelley.

The Court: We are talking about Rayson now.

Mr. Dudley: At the moment.

The Court: Rayson is the one we were talking about.

Mr. Dudley: I thought you had stopped talking *about* [360]

The Court: No. Well, as far as Kelley is concerned, Kelley has been convicted in this court. He is on probation. If he would be found guilty in this case, his probation might be revoked and he would be sentenced and he would probably be sentenced for a long, long time in this case. I certainly don't want to send a defendant to penitentiary for three or five years upon the sole testimony that the main witness of the government said he gave a telephone number to Kelley. I think that this telephone number could have been given to Rayson. There was lots of opportunity. The government didn't have

Fletcher under surveillance all the time. He wasn't watched 24 hours a day. He could have passed the telephone number to him.

Consequently, I am going to find the defendant Kelley not guilty as to Count 1, not guilty as to Count 2, and not guilty as to Count 3.

The defendant Rayson, I am going to find not guilty as to Count 1, Guilty as to Count 2 and guilty as to Count 3.

Is the defendant Rayson in custody?

Mr. Neblett: No, your Honor.

The Court: He may remain on bond until the time of sentence. I will refer the matter to the probation department for pre-sentence report and set the matter down for hearing on December 19th at 2:00 o'clock in the afternoon.

The defendant may remain on bond until the time of [361] sentence.

The Clerk: The bond is in the other case. Do you want to continue that case to the 19th then?

The Court: Yes. The other case should be continued to the 19th and not have the necessity of putting up a new bond.

Mr. Neblett: And Kelley's bond is exonerated?

The Court: Kelley's bond will be exonerated.

Will you take Mr. Rayson up to the Probation Department?

Mr. Neblett: Yes, your Honor.

The Court: That's all in this case then. [362]

[Endorsed]: Filed December 28, 1955.

[Endorsed]: No. 15021. United States Court of Appeals for the Ninth Circuit. Eugene Rayson, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 3, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15021

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S STATEMENT OF POINTS
ON APPEAL

To the Clerk of the United States Court of Appeals for the Ninth Circuit, and to Laughlin E. Waters, U. S. Attorney, Louis Lee Abbott, Assistant U. S. Attorney, and Robert John Jensen, Assistant U. S. Attorney, Attorneys for the Appellee:

Comes now the appellant, Eugene Rayson, and, pursuant to Rule 17 (6) of this Court, files his

statement of the points on which he intends to rely on this appeal:

1. The District Court erred in denying defendant's motion for acquittal made at the conclusion of the Government's case.

2. The evidence is insufficient to support the finding of the District Court (the case was tried by the Court without a jury, a jury having been expressly waived in writing by the Government, and by the defendant and appellant, Eugene Rayson) that the defendant was guilty as charged in counts II and III of the indictment.

3. The decision of the District Court, finding the appellant, Rayson, guilty on counts II and III of the indictment, and sentencing him to three years in the penitentiary and finding him \$5.00 on each of the two counts, the penitentiary sentences to run concurrently, is not supported by substantial evidence, or any evidence sufficient to sustain the decision that the appellant was guilty as charged.

4. The findings by the District Court that the defendant and appellant was guilty on counts II and III of the indictment are both clearly erroneous.

5. Neither the findings of guilty nor the judgment is supported by substantial evidence.

6. Both the findings of guilty and the judgment are contrary to the weight of the evidence.

7. The District Court erred in admitting the testimony of the witness Norman Fletcher, to which objections were made.

8. The District Court erred in admitting testi-

mony of the witness M. P. Richards, to which objections were made.

9. The District Court erred in admitting the testimony of the witness A. F. Landry, to which objections were made.

10. The District Court erred in admitting the testimony of the witness William R. Farrington, to which objections were made.

11. The District Court erred in ruling that the evidence did not, as a matter of law, disclose an entrapment of the defendant and appellant.

12. The District Court erred in ruling that the telephone conversations between the witness Norman Fletcher and the defendant and appellant, Eugene Rayson, a recording instrument being attached to the telephone and records made of such conversations, were admissible over the objection of the defendant.

13. The District Court erred in ruling that the telephone conversations between the witness Norman Fletcher and the defendant and appellant, the same being listened in on by other persons, were admissible.

14. The District Court erred in holding that the evidence obtained by the telephone conversations was admissible and that the same was not barred by the provisions of 47 U.S.C., Section 605.

15. The District Court erred in denying defendant and appellant's motion to strike the testimony of the telephone conversations between the witness Norman Fletcher and defendant and appellant, a recording instrument being attached to the tele-

phone and recordings made of such conversations, and other witnesses, who afterwards testified, listening in to the conversations.

16. The District Court erred in denying the defendant's motion for a new trial.

17. There is no evidence whatever to show that the defendant and appellant, Eugene Rayson, did ever receive, conceal or transport or facilitate the concealment or transportation of a narcotic drug, charged in count II of the indictment.

18. There is no evidence whatever to show that the defendant and appellant, Eugene Rayson, did ever sell or facilitate the sale of a certain narcotic drug to one Norman Fletcher, as charged in count III of the indictment.

19. The District Court erred in denying the defendant's motion for an acquittal at the close of the prosecution's case.

20. The District Court erred in denying the defendant and appellant's motion for new trial.

Dated: February 9, 1956.

/s/ WM. H. NEBLETT,
Attorney for Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 10, 1956. Paul P. O'Brien, Clerk.

No. 15021

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

WM. H. NEBLETT,

649 South Olive Street,
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Attorney for Appellant.

FILED

JUN 20 1936

PAUL P. O'BRIEN, CLERK



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No. 15021

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

Appellant, Eugene Rayson, and one Ollie W. Kelley, were indicted November 16, 1955, by the Federal Grand Jury at Los Angeles, California. [R. 3-6.] The indictment was in three counts: Count I charged defendants Kelley and Rayson with conspiring to possess, sell and conceal narcotics in violation of Title 18, United States Code, Section 371; Count II charged the defendants with unlawful receipt, transportation and concealment of approximately 2 ounces, 82 grains of heroin, in violation of Title 21, United States Code, Section 174;¹ Count III charged the defendants with unlawfully selling and facilitating the sale of approximately 2 ounces, 82 grains of

¹Quoted in Appendix.

heroin, to one Norman Fletcher (also known as Albert Fletcher), in violation of Title 21, United States Code, Section 174. The defendants were arraigned [R. 6] and each of them plead *not guilty* to all three counts of the indictment.

The case was tried before Honorable Harry C. Westover, Judge, without a jury [R. 7], a jury having been waived. The Court found Ollie W. Kelley [R. 8] not guilty on all three counts. The Court found Eugene Rayson not guilty on Count I, but guilty on Counts II and III.

A motion for a new trial was made on behalf of Rayson [R. 9-12] and denied. The Court sentenced Rayson to three years imprisonment on each of Counts II and III, the sentences to run concurrently, and ordered Rayson to pay a fine to the United States of America in the sum of \$5.00 on each of Counts II and III, making a total fine of \$10.00.

Rayson appealed to this Court from the judgment and sentence of the District Court. [R. 12-13.] Appellant Rayson is at liberty on bail fixed by the District Court pending his appeal. Statutory provisions and authority to sustain the jurisdiction of this Court are Sections 1291 and 1294(1) of Title 28, United States Code.

Statement of the Case.

The Government called five witnesses: Norman (Albert) Fletcher [R. 79], an informer for the Federal Bureau of Narcotics; Malcolm Richards [R. 132], an agent for the Federal Bureau of Narcotics; William J. Gowans [R. 227], a chemist employed by the Internal Revenue Bureau; the other two Government witnesses, Algy F. Landry [R. 285] and William R. Farrington

[R. 215] are Deputy Sheriffs of Los Angeles County assigned to the Narcotics Division of the Sheriff's Office.

Norman (Albert) Fletcher, the principal Government witness and the only witness for the Government who had any personal contact whatever with the appellant, Rayson, is an informer [R. 79-85] in the employ of the Federal Narcotics Bureau. Fletcher says he is 35 years old. [R. 74.] He came here from Louisiana during the year 1949. He had two prior narcotics convictions, one federal and the other state, in his native state of Louisiana. [R. 74.] He was convicted the third time for a narcotics offense in the Superior Court of Los Angeles County, California, and served a term in Folsom Penitentiary. [R. 75.] As soon as he got out of Folsom he went back to his old profession of a narcotics peddler. [R. 76.]

In February, 1955, Fletcher was arrested by the federal authorities in Los Angeles for possession of narcotics [R. 79] and brought before the Federal Commissioner there who released him on his own recognizance. [R. 84-85.] On what theory the Commissioner released Fletcher is not clear; he was released to officers of the Federal Narcotics Bureau at Los Angeles, and attached to Malcolm Richards of the Bureau. Fletcher escaped trial on the charge by what he says to have been cooperation with and employment by the Federal Government as an undercover agent. [R. 80-81.] Fletcher said, in response to questions by the Court [R. 81], that he was released to the officers by promising to work with them to apprehend "the bigger peddlers—narcotics peddlers."

Rayson ran a smoke shop at 3326 South Main Street, Los Angeles. The smoke shop was operated as a recreation club, at which tobacco and soft drinks were sold.

Fletcher was accustomed, from June, 1955, until the arrest of appellant, to visit the smoke shop from time to time. [R. 267-268.]

The conviction in this case rests entirely upon the testimony of the informer, Fletcher, already a three time loser under indictment for a fourth narcotics offense, and upon the testimony of Federal and State Narcotics Officers as to the contents of telephone conversations claimed to have taken place between appellant Rayson and the witness Fletcher, which were intercepted by the Federal and State Officers, and which were recorded by means of telephone and wire tapping instruments.

It is apparent that Fletcher went all out to get the defendants, his motive being to save himself or to assist as far as possible in getting himself freed from the pending narcotics charge, filed against him February, 1955. It is not clear from the record whether Fletcher got in touch with Rayson or Rayson got in touch with Fletcher. Fletcher claims that Rayson telephoned him. [R. 28.] According to Fletcher, Rayson telephoned the first time, September 14, 1955, at Agent Richards' house, using a telephone number Fletcher said he had given to Kelley the day before. [R. 110-111.] At this first telephone conversation on September 14, 1955, Fletcher said he told Rayson he wanted to get in touch with him to purchase "some stuff" [R. 111-112]; and Fletcher said that he made an appointment with Rayson to meet him that day at 58th and Hoover, Los Angeles, at 11:00 in the morning.

Fletcher said that he met Rayson at the appointed time and place and gave him \$700.00 for 2 ounces of heroin, which Fletcher said Rayson was to deliver to him later that day. [R. 112-114.] Fletcher claimed that Rayson got into Fletcher's car where he gave him the \$700.00. [R. 112-113.] At the time Fletcher had a recording device on his person which would pick up all the conversation between him and Rayson. [113-114.] What was on that recording device remains a secret between the narcotics officers and their informer. Rayson admitted that he met Fletcher at the appointed place and did collect \$50.00 from Fletcher [R. 272] which was the payment of a loan that Rayson had previously made to Fletcher. [R. 269.]

Fletcher said he was searched before he went to talk with Rayson by the narcotics officers who gave him \$860.00 to make the purchase. [R. 140.] When Fletcher returned after seeing Rayson neither he nor his car was searched to find out whether he still had the money or had parted with the money and procured the heroin. The officers allowed him to leave and go to Beverly Hills, fifteen miles away, to visit his girl friend and be gone for about two hours.

It is the contention of the appellant that Fletcher went out to see his girl friend and left the \$700.00 with her, and during that time planted the heroin under the railroad sign at Budlong and Slauson, where it was later picked up by Fletcher and officer Richards. Fletcher returned from the visit to his girl friend in Beverly Hills, and

his testimony is [R. 40] that Rayson conveniently telephoned him at officer Richards' house about 6:30 P. M. to tell him where to pick up the heroin. Officers Richards and Farrington and Fletcher were present and recorded the conversation with a telephone recording machine. [R. 146, 203.]

There is no proof of any kind in this case that Rayson was the man on the other end of the telephone in any of the conversations, except that Fletcher claimed that he could recognize his voice, an easy claim upon which any person could be convicted upon the testimony of an informer who was interested in keeping the \$700.00, and at the same time disposing of some narcotics he probably procured from his girl friend and deposited under the railroad sign. Again, at both of these telephone conversations, on the 14th, upon which the whole case hinges, a recording device was attached which recorded all that was said.

Timely objections to the introduction by the Government of the telephone conversations were made by appellant and overruled; these objections were followed by motions to strike the testimony, which were denied [R. 69, 129, 231-236]; a motion for acquittal was made and denied [R. 237-240]; and all of the questions so raised were urged on a motion for new trial which was denied. [R. 8, 12.]

Specification of Errors.

1. The District Court erred in ruling that the telephone conversations between the witness Norman Fletcher and appellant Eugene Rayson, a recording instrument being attached to the telephone and recordings made of such conversations, were admissible over the objections of appellant.

2. The District Court erred in ruling that the telephone conversations between the witness Norman Fletcher and appellant Eugene Rayson, the same being listened to by other persons, were admissible over the objections of the appellant.

3. The District Court erred in holding that the evidence obtained by the telephone conversations was admissible and that the same was not barred by the provisions of 47 U. S. C. 605.

4. The District Court erred in denying appellant's motion to strike the testimony of the telephone conversations between the witness Norman Fletcher and appellant Eugene Rayson, a recording instrument being attached to the telephone and recordings made of such conversations.

5. There is no evidence to show that appellant Eugene Rayson did ever receive, conceal or transport or facilitate the concealment or transportation of the narcotic drug charged in count II of the indictment, and the finding of guilty on this count is clearly erroneous.

6. There is no evidence to show that appellant, Eugene Rayson, did ever sell or facilitate the sale of a certain narcotic drug to one Norman Fletcher, as charged in count III of the indictment, and the finding of guilty on this count is clearly erroneous.

7. The District Court erred in denying appellant's motions for acquittal made at the close of the prosecution's case.

8. The District Court erred in denying appellant's motion for a new trial.

To comply with Rule 18 (d) of this Court, relating to the prescribed method of raising on appeal errors in the admission and rejection of evidence, appellant presents the following objections and summaries of the evidence as applicable to Specification of Errors, Numbers 1, 2, 3 and 4.

Government witnesses Fletcher, Richards, and Farrington all testified that there were four telephone calls from appellant to Government informer Fletcher, September 14, 1955. The testimony of the officers and the informer was that the first three of these calls were for the purpose of making appointments for Rayson and Fletcher to meet. The testimony of the telephone conversations is very vague but, given the strongest implications and inferences, the conversations amounted to solicitation by the informer Fletcher of Rayson to sell Fletcher "some stuff" and to make appointments where they could meet and talk the matter over, settle the price and plan the delivery of some heroin. [R. 29, 36, 38, 41, 116-117, 123, 143-144, 146-147, 196, 197, 201, 202, 204, and 217-221.]

The fourth one of these calls was late in the afternoon when the officers claimed that Rayson said over the telephone to Fletcher that the "stuff" could be found under a railroad sign near the intersection of Budlong and Slauson Avenues in Los Angeles.

A regular recording machine for recording telephone conversations was attached to the telephone during all

four of these conversations and Fletcher and the two officers, Richards and Farrington, listened in and heard the conversations and testified to them at the trial.

At the conclusion of the direct examination of informer Fletcher, appellant moved to strike his testimony because it appeared by this time that Federal Officer Richards and Deputy Sheriff Farrington were listening in on the conversations. The motion to strike was made on the ground that receiving the testimony "violated the defendant's rights under Article IV and Article XIV of the Constitution of the United States," and because such testimony "is not admissible and cannot be used to convict the defendant because it is an invasion of his right of privacy." [R. 69.]

The Court denied the motion to strike on the ground that the receiver was held close enough to the ears of the three present so that all could hear. At this time there was no evidence that the line had been tapped. The Court stated:

"Let's assume, Mr. Neblett, A and B are carrying on a telephone conversation. If C taps that line somewhere and listens in, of course, it is illegal." [R. 71.]

At this point [R. 72] the District Attorney, Mr. Jensen, said that he "did not want any misapprehension about what occurred in this instance. As a matter of fact, these telephone conversations were in part recorded. That is not presently in evidence." The Court then stated [R. 73] that it could not rule on something not before the Court; and that "if it appears later that there was an interception, I am going to reverse my ruling."

On cross-examination Fletcher admitted that all of the telephone calls on September 14, 1955, were recorded.

[R. 123.] Officer Richards also testified, on cross-examination, that all of the telephone calls on September 14, 1955, were recorded on the recording machine tapping the telephone line [R. 202-204.]

With the permission of the Court, rulings on the objections were deferred until it had appeared clearly from the testimony of the Government witnesses that the telephone line was tapped during all of the supposed conversations between Rayson and the informer Fletcher. [R. 231.] At pages 232-233 of the record, counsel for appellant stated:

“If your Honor please, I can’t specify in any more particularity than moving to strike the testimony of the witness Fletcher and the witness Farrington and the witness Richards as to their testimony relating to that part of the evidence which has been produced by the government on the proposition that certain telephone conversations were made to the house of Richards on his telephone number, and to that telephone was attached a listening device which the government has shown was attached, a tape recorder, and it has been testified here that the tape recordation was somewhat indefinite, but you could listen to it several times and tell what it said, so I assume that the testimony that they are giving here is testimony they learned from this tape recorder which they have not yet offered in evidence.

I feel that the motion to strike could be well taken upon the ground that obtaining evidence in that manner is in violation of Section 605, I believe it is, 47 USCA.”

The Court denied the motion to strike. [R. 237.]

The question of wire tapping was again raised on motion for a new trial. The Court denied the motion. [R. 11-12.]

Summary of Argument.

(A) The appellant was convicted on evidence obtained by the Federal and State officers, in violation of the Federal Communications Act, Title 47, United States Code Section 605, which forbids the interception of any telephone communication and the disclosure of the intercepted communication or any part of it. Under the facts of this case, as already outlined, the point seems to have been definitely settled in favor of the appellant by a recent decision of this Court, necessitating a reversal of his conviction on both counts.

United States v. Sugden (C. A. 9, Nov. 10, 1955),
226 F. 2d 281, certiorari granted;

Sugden v. United States, 76 S. Ct. 342, affirmed
76 S. Ct. 709.

(B) The finding that the appellant was guilty under counts II and III of the indictment is clearly erroneous, as there is no competent evidence or, in fact, any evidence at all, to show that appellant Rayson ever received, concealed, transported or facilitated the concealment or transportation of a narcotic drug, or ever sold or facilitated the sale of a narcotic drug to Norman Fletcher. This Court may reverse appellant's conviction under its power to correct "plain error."

Fed. Rules Crim. Proc. Rule 52(b);

Din v. United States (C. A. 9, March 2, 1956),
232 F. 2d 283.

ARGUMENT.

I.

As has been pointed out, *supra*, United States Code Title 47, Section 605, forbids the interception and disclosure of any telephone communication when not authorized by the sender. In the case of *United States v. Sugden* (C. A. 9, Nov. 10, 1955), 226 F. 2d 281, the defendants were indicted for conspiracy to violate the immigration laws by employing Mexican nationals, commonly called "wetbacks," on their farm and taking various steps to hide them and to avoid being caught with them in their employ. The defendants had a private radio. An agent of the Federal Communications System intercepted their broadcasts. This Court held that the use in evidence of the intercepted material obtained by the agent, monitoring the broadcasts, at the time when the station and the Sugdens were licensed, was forbidden by United States Code Title 47, Section 605.

In the opinion in *United States v. Sugden*, this Court has succinctly stated the rule applicable to the case at bar, as follows:

"The Government must concede that if the facts were the same save that Stratton had tapped the Sugdens' telephone line and obtained the same information without the Sugdens' consent as he did by monitoring the air waves, then the trial court's rulings were correct. *Weiss v. United States*, 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298."

II.

Appellant contends that the findings of guilty on counts II and III are clearly erroneous and constitute "plain error." All that the testimony of the government witnesses shows is that there were some telephone conversations September 14, 1955, the object of the telephone conversations being to set up a deal for the purchase by Fletcher of some heroin. There is no credible testimony that the person who was talking to Fletcher over the telephone was Rayson. True, Fletcher said that he recognized Rayson's voice. There is no contention that the officers who tapped the telephone line and listened in on the conversations knew who was on the other end of the telephone. The testimony that appellant met Fletcher at 58th and Hoover is fully explained by appellant's testimony that he met Fletcher there to collect the loan of \$50.00 which Fletcher owed him.

Any hypothesis consistent with innocence overrides one that is consistent with guilt. Fletcher, a three time loser, had every possible motive to bring about the conviction of Rayson to save himself from being convicted on the pending charge, in which the minimum penalty was ten years.

The biggest weakness in the government's case is the dereliction of the officers in allowing Fletcher, immediately after he was supposed to have paid \$700.00 to Rayson, to leave the officers and be absent for two hours, which would have given him ample time to dispose of the money he said he had paid Rayson and to pick up some heroin

and plant it under the railroad sign at Budlong and Slau-son Avenues, in Los Angeles.

On these facts the conviction of appellant on counts II and III of the indictment is clearly erroneous, not sustained by any competent evidence whatever, and certainly not by that type of evidence which proved his guilt beyond a reasonable doubt, which the government had to do to secure his conviction.

Appellant respectfully contends that his conviction should be reversed.

Respectfully submitted,

WM. H. NEBLETT,

Attorney for Appellant.

APPENDIX.

Title 21, U. S. C., Section 174.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than \$2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than \$2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than \$2,000 and imprisoned not less than ten or more than twenty years. Upon conviction for a second or subsequent offense, the imposition or execution of sentence shall not be suspended and probation shall not be granted. For the purpose of this subdivision, an offender shall be considered a second or subsequent offender, as the case may be, if he previously has been convicted of any offense the penalty for which is provided in this subdivision or in section 2557(b)(1) of Title 26, or if he previously has been convicted of any offense the penalty for which was provided in section 9, chapter 1, of the Act of December 17, 1914 (38 Stat. 789), as amended; sections 171, 173 and 174-177 of this title; section 12, chapter 553, of the Act of August 2, 1937 (50 Stat. 556), as amended; or sections 2557(b)(1) or 2596 of Title 26. After conviction, but prior to pronouncement of sentence, the court shall be advised by the United States attorney

whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the offender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed in this subdivision.

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 47, U. S. C., Section 605.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a

subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress.

No. 15021.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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No. 15021.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

This is an appeal from a Judgment of the United States District Court for the Southern District of California, which adjudged appellant to be guilty of Counts Two and Three of an Indictment charging him, in essence, with unlawfully receiving, concealing and transporting, and unlawfully selling a narcotic drug in violation of Section 174 of Title 21, United States Code [R. 5, 11], which judgment imposed upon appellant concurrent three year periods of imprisonment and a fine [R. 12].

The violations are alleged to have occurred in Los Angeles County, California, within the Central Division of the Southern District of California [R. 5].

The jurisdiction of the District Court is based upon Section 3231 of Title 18, United States Code. This Court has jurisdiction to entertain this appeal and to review the judgment in question under the provisions of Sections 1291 and 1294 of Title 28, United States Code.

II.

Statement of the Case.

Appellant and his co-defendant Ollie W. Kelley, who was acquitted after trial, were indicted on November 16, 1955 [R. 3-6]. Appellant was arraigned and entered a plea of not guilty to all counts of the indictment on November 21, 1955 [R. 6], waived trial by jury on November 29, 1955 [R. 7] and proceeded that day to trial [R. 15]. The Court rendered its decision acquitting co-defendant Kelley on all counts, acquitting appellant on Count One, and finding appellant guilty on Counts Two and Three at the close of the trial on December 1, 1955 [R. 308, 325].

At the close of the Government's case in chief a motion to strike evidence theretofore admitted [R. 232] and a motion for acquittal [R. 237] were made on behalf of appellant. The trial court denied both motions [R. 237, 240]. The appellant thereafter introduced evidence on his own behalf. The motion for acquittal was not renewed at the close of all the evidence [R. 307, *et seq.*].

Imposition of sentence was set for December 19, 1955 [R. 325]; a motion for new trial was filed on December 6, 1955 [R. 10] and noticed for hearing December 19, 1955 [R. 9].

The motion for new trial was denied [R. 12], sentence was imposed [R. 12] and on December 23, 1955, appellant filed his Notice of Appeal [R. 12] followed on February 10, 1956 by appellant's statement of points on appeal [R. 326].

III.

Statement of Facts.

On a chronological basis, the facts in evidence are as follows:

Fletcher, who had been involved in narcotics transactions since 1940 [R. 59] and who had been twice convicted of narcotic violations [R. 59-61], was released from Folsom Penitentiary in April of 1953 [R. 75]. Fletcher had known appellant and Kelley since 1953 and had prior narcotic transactions with Kelley [R. 76]. After an arrest in February of 1955 Fletcher worked with federal and county officers in their effort to apprehend the bigger peddlers with whom he had formerly been dealing [R. 80-82, 170, *et seq.*].

On August 22, 1955 at about 10:30 a. m. Fletcher contacted Kelley and discussed purchase of heroin. It was arranged that Fletcher was to be contacted by appellant later [R. 20-23, 97]. When no contact was made, Fletcher saw Kelley again on September 13, 1955, gave Kelley Federal Agent Richards' home telephone number where a call was to be made the next morning [R. 26-28, 102-103].

Fletcher was at Agent Richards' house the morning of September 14, accompanied by other officers [R. 28, 137-138], and he took the telephone call that came in from appellant, whose voice was recognized [R. 28-30]. Deputy Sheriff Farrington listened to this call (as well as others made that day) and also recognized the voice of Rayson [R. 29, 36, 193, 217-222]. This listening by Farrington was accomplished by placing his ear to the phone along with Fletcher [R. 193].

During this telephone call the first meeting was set up between Fletcher and appellant at 58th Street and Hoover

for some 15 minutes later [R. 32, 111, *et seq.*], where they actually met, moving on to 57th Street off Hoover [R. 33-34]. Here Fletcher and appellant discussed face to face a sale of two ounces of heroin [R. 34, 114-115], being then under the observation but out of hearing of several of the officers [R. 142, 287-288, 297]. Appellant advised Fletcher he would call again an hour later [R. 35].

After Fletcher had returned to Richards' house he received a second and third call from appellant, within minutes of each other, at approximately noon of the same day [R. 35, 142]. Farrington again listened to both sides of the conversation [R. 36, 144]. Delivery of the \$700.00 purchase price was arranged to take place within 15 minutes at 58th Street and Main [R. 37] but delivery of the drugs was put off until 6:30 p. m. [R. 36-37].

Fletcher and appellant met at 58th and Main Streets where \$700.00 was paid to appellant [R. 39]. This meeting was observed by several of the officers [R. 145, 298].

At 6:30 p. m. on September 14, 1955 appellant again called and told Fletcher who had answered the telephone that the heroin was at the base of a railroad sign at Budlong and Slauson [R. 41-42, 146-147], from which point it was actually taken by Agent Richards [R. 43, 148]. Agent Richards listened into both parties on this telephone call by placing his ear to the handset [R. 147].

A qualified chemist testified the contents of the retrieved package were heroin [R. 226-229].

Efforts were made, commencing September 22, 1955, to consummate a second sale, but this apparently fell through when the supply available to the appellant was stolen [R. 46-48, 51-52, 164-165]. Meetings had occurred between Fletcher and appellant on this attempt which were observed by others [R. 165-167].

Kelley admitted seeing Fletcher on two occasions during the times in question, but denied that he cooperated in any way as to the sale of narcotics [R. 244-246].

Appellant testified he had loaned money to Fletcher in the latter part of August or the first part of September and that it was repaid at 4:00 p. m. on September 14, 1955 [R. 269-273] at a meeting at 56th Street and Broadway [R. 272]. Appellant denied making any of the calls of September 14 [R. 273, 279] and denied the meetings with Fletcher at Hoover and 58th Street and at 58th and Main [R. 279-280], saying he left home at noon, went to his place of business and returned home at 4:30 to 5:00 p. m. [R. 279, 282-283], the meeting with Fletcher being at 4:00 p. m. on the way home. This testimony was controverted by Sergeant Landry who had followed appellant [R. 286-288], by Farrington and Richards who were with Fletcher continuously until 5:00 p. m. [R. 205-206, 213, 300-303] and by the testimony of all witnesses to the earlier meetings and telephone calls.

Although all the telephone conversations made to Agent Richards' house on September 14, 1955 were recorded [R. 121-124, 203], the recordings were not put in evidence, and there is no evidence in the record that any use was ever made of these recordings or that the officers acted in response to them. The recording was done by attaching a device to the receiver of the telephone [R. 116, 203-204] or as a witness stated,

“There was some clamp that was attached to the receiver and then it was recorded” [R. 203].

Certain of the officers were listening in at the same time [R. 116, 203], as heretofore shown.

IV.

Argument.

A. Appellant Failed to Renew His Motion for Acquittal at the Close of All Evidence, Thereby Waiving His Right to Have Reviewed the Adverse Ruling of the Trial Court.

Appellant's specifications of error numbers 5, 6, 7 and 8, insofar as the latter deals with insufficiency of the evidence, are not reviewable on appeal. Appellant waived his rights to object to the trial court's denial of the motion for acquittal made at the close of the Government's case in chief by putting in evidence of his own and failing to renew this motion at the close of all the evidence in the case.

Mosca v. United States, 174 F. 2d 448, 450-451 (9th Cir., 1949);

Malatkofski v. United States, 179 F. 2d 905, 910 (1st Cir., 1950);

United States v. Powell, 155 F. 2d 184 (7th Cir., 1946);

Leeby v. United States, 192 F. 2d 331, 333 (8th Cir., 1951).

B. Conflicts of Fact and Credibility of Witnesses Are to Be Decided by the Trial Court.

It is well settled that an appellate court will not review questions of fact nor weigh evidence where there is any substantial and competent evidence to support a finding of guilt. On review the appellate court will consider the evidence and all the inferences which may reasonably

be drawn therefrom from the aspect most favorable to supporting the findings of the court below.

Woodward Laboratories Inc., et al. v. United States, 198 F. 2d 995, 998 (9th Cir., 1952);

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948), cert. den. 335 U. S. 853.

And the foregoing is equally applicable to a trial to the court without a jury.

Penosi v. United States, 206 F. 2d 529, 530 (9th Cir., 1953);

C-O-TWO Fire Equipment Co. v. United States, 197 F. 2d 489, 491 (9th Cir., 1952), cert. den. 344 U. S. 892;

United States v. Empire Packing Company, 174 F. 2d 16 (7th Cir., 1949), cert. den. 337 U. S. 959.

The trial court was of the opinion the case turned on the credibility of the witnesses [R. 307] and it is clear the court below did not believe the story told by appellant [R. 316, 319-321]. Credibility of witnesses and the weight to be given their testimony are for the trier of the facts.

Stoppelli v. United States, 183 F. 2d 391, 394 (9th Cir., 1950), cert. den. 71 S. Ct. 88;

Norfolk v. McKenzie, 116 F. 2d 632, 635 (6th Cir., 1941).

C. There Was Substantial Evidence to Support the Judgment of Conviction.

The finding of guilt by the court was amply supported by the evidence.

The key evidence the Government relies on is as follows: During the morning telephone call of September

14, 1955, Fletcher told appellant he wanted to get two ounces of "stuff" and set up a meeting at 58th Street and Hoover [R. 32, 218-219]. In the course of that meeting, Fletcher stated to appellant he wanted to get two ounces of "stuff". Appellant stated the price would be \$350.00 per ounce for one or two ounces or \$275.00 per ounce for more than two ounces [R. 34-35, 114-115]. Appellant also stated he would call back in an hour [R. 35].

In the two calls at noon of September 14, appellant stated the earliest he could take care of the business was at 6:30 p. m. Fletcher stated he wanted to get rid of the money and appellant agreed to take it then [R. 36-37, 220-221]. At approximately 12:30 to 1:00 p. m. Fletcher met Rayson at 58th and Main and paid him \$700.00 [R. 39].

Later, at about 6:30 p. m. appellant called again and stated the package was at the base of a particular railroad sign and to pick it up [R. 41-42, 147].

The "stuff" referred to in these conversations was heroin [R. 60] and the package found as directed contained 2 ounces and 82 grains of heroin [R. 43, 148, 226-229].

A reasonable inference, rather a compelling deduction from the foregoing, is that appellant placed the narcotic at the base of the railroad sign, thereby both transporting and concealing a narcotic. Appellant, after having received the purchase price and having delivered or aided in the delivery of the narcotics, regardless of how indirectly, was properly found guilty of selling such narcotic.

Furthermore if the finding of guilt be sustained as to either of the counts the judgment must be affirmed where the sentences imposed are to run concurrently.

See:

Doan v. United States, 202 F. 2d 674, 678 (9th Cir., 1953);

Lowden v. United States, 187 F. 2d 484 (9th Cir., 1951);

Danziger v. United States, 161 F. 2d 299, 300 (9th Cir., 1947).

In considering the sufficiency of the evidence, appellee would point out to the Court that certain of the contentions of the appellant are not supported by the record. The representation made at the top of page 5 of appellant's brief that Fletcher paid the \$700.00 to appellant at the first meeting on September 14 is incorrect [R. 34, 37-39, 112-115, 117-118].

The further representation on said page that Rayson (appellant) admitted he met Fletcher at the appointed place to receive repayment of the loan is also incorrect. Rayson denied such meeting [R. 279-280], stating the repayment was made at another time and at another place [R. 271-272, 280].

This same error is repeated in appellant's brief in the last part of the first paragraph on page 13.

Appellant's further contention at this last point that "any hypothesis consistent with innocence overrides one that is consistent with guilt," even if correct, is not applicable to this case because it is for the trier of the fact to determine what inferences should be drawn from the evidence and whether they are equally consistent with innocence and guilt, *Stoppelli* case, *supra*, at page 393. Furthermore in this record there is direct evidence of the negotiations for sale and payment of the purchase price to appellant, for which inferences need not be drawn.

D. The Trial Court Did Not Err in the Admission of Evidence nor in the Denial of Appellant's Motion to Strike Evidence. (Appellant's Specifications of Error Numbered 1, 2, 3 and 4.)

Fletcher testified he had previously had numerous telephone calls with appellant [R. 29] a fact not denied by appellant, and that appellant's voice was recognized [R. 28, 30, 35, 41] as to each of the calls. Although counsel objected initially [R. 29] that no foundation was laid for such recognition, there was thereafter no objection made. Farrington also identified appellant as making the calls [R. 217-218] without objection to such identification [R. 218].

Appellant's further objection to the admission of evidence appears to be that testimony of the telephone conversations is incompetent because there was an interception and publication of a wire communication within the proscription of the Federal Communications Act, particularly Title 47, United States Code, Section 605, or an invasion of the Constitutional rights of the appellant.

An unlawful interception of a telephone communication does not amount to a search or seizure prohibited by the Constitution.

Olmstead v. United States, 277 U. S. 438 (1928);
Goldstein v. United States, 316 U. S. 114, 120 (1941);

Goldman v. United States, 316 U. S. 129, 135 (1941).

Although appellant repeatedly asserts there is evidence of "wire tapping" in this case, the record does not so show. There were persons, other than the parties conversing, listening with their ears to the receiver [R. 29,

36, 144, 147, 193, 217-222] and there were recordings made at the receiver end [R. 121-134]. All the evidence on the nature of the connection of the recorder to the telephone is contained in the record at pages 116 and 203-204.

There is therefore no evidence of "wire tapping" such as considered in *Nardone v. United States*, 302 U. S. 379 (1937).

Furthermore the entire record clearly shows from a careful reading that the officers acted on what Fletcher told them of the conversations or what they themselves overheard, *e. g.*, R. 194, 197-198, 201-202. There is no showing whatsoever that the officers acted in response to what had been recorded. The rule of the second *Nardone* case is therefore not applicable.

Nardone v. United States, 308 U. S. 338 (1939).

In all events two propositions fully answer appellant. First, there was not a publication within the meaning of the Communications Act. In this respect the Government did not offer the recordings of the telephone conversations, and cases such as those immediately following are inapplicable.

For example in *United States v. Stephenson*, 121 Fed. Supp. 274 (D. C. D. C., 1954), the Court held that the telephone call was intercepted where the wires of the recorder were introduced into the box of the telephone and further held that the *recordings* and *transcript* could not be used. The Court did not hold that either party to the conversation was barred from testifying.

In *United States v. Polakoff*, 112 F. 2d 888 (2nd Cir., 1940), the case was reversed because the recordings were

introduced in evidence (see p. 890). See further discussion of this case below.

Secondly, listening to a conversation on the telephone at the end of one of the parties to the call, or recording such conversation from such location, when done with the knowledge and consent of that party, are not interceptions within the meaning of the Communications Act.

In *Goldman v. United States* (1941), 316 U. S. 129, the Supreme Court held that overheard conversations on the telephone, acquired by use of a detectograph in an adjacent room, were not "interceptions" within the meaning of the statute and were admissible in evidence.

Where police overheard a telephone conversation by listening at the end of an informant, their testimony was held competent because there was no "interception" as defined by the Supreme Court.

United States v. Pierce (N. D. Ohio, 1954), 124 Fed. Supp. 264; affirmed *per curiam* in *Pierce v. United States*, 224 F. 2d 281 (6th Cir., 1955).

To the same effect, where listener placed his ear to the receiver with the consent of the party at that end of the conversation, see

United States v. Bookie, 229 F. 2d 130, 132 (7th Cir., 1956).

In a recent case reviewing prior decisions on this subject, where officers listened in on extensions, their testimony was held to be properly admitted.

Flanders v. United States, 222 F. 2d 163 (6th Cir., 1955).

Listening on an extension with the consent and knowledge of one of the parties is not an interception within the meaning of the statute.

United States v. White, 228 F. 2d 832, 834-835 (7th Cir., 1956).

In another recent case, decided by the Supreme Court of California, *In Bank*, the Court held that recording a telephone conversation by means of an induction coil and recorder at one end of the call is not an interception within the meaning of Title 47, United States Code, Section 605.

People v. Mallotte, 292 P. 2d 517, 519-520 (Calif. Sup. Ct., 1956).

Decisions which appear to be *contra* to those discussed above have generally been criticized and rejected. The *Polakoff* case, *supra*, for example, has a strong dissent by Clark, Circuit Judge, and one of the concurring judges (Chase) in a subsequent case felt that *Polakoff* had been overruled by the Supreme Court's decision in the *Goldman* case, *supra*. (See Chase's opinion in *Reitmeister v. Reitmeister*, 162 F. 2d 691, at 697, and Clark's concurrence at page 698. See also the *Flanders* case, *supra*, at page 166, and the *Bookie* case, *supra*, at page 132, where *Polakoff* is discussed but not followed.)

Appellant cites a recent decision of this Court as authority for deciding the instant case; namely:

United States v. Sugden, 226 F. 2d 281 (9th Cir., 1955), cert. granted in *Sugden v. United States*, 250 U. S. 952 and affirmed *per curiam* in 351 U. S. 916.

This was a case involving government agents testifying to broadcasts by radio which had been heard by them at a

radio separate and distinct from the sets used by the parties to the broadcast and which were heard by such agents without the knowledge or consent of any of the parties to such broadcasts.

This Court itself alluded to possible distinctions between interceptions of radio communications and of wire communications. (See footnote 2 of the decision p. 284 and comment on knowledge and consent on p. 285.) It is submitted the *Sugden* case is not parallel with either the facts or the law of the present case. Had the agents in the *Sugden* case overheard the transmitted messages by listening at the radio of the receiver, with his permission, the facts would be comparable to the case at bar, and, as this Court has indicated in its opinion, there would then have been no "interception" involved and the evidence of what was heard would be admissible.

V.

Conclusions.

Appellant did not preserve his right to have the sufficiency of the evidence reviewed, but even considering this question on its merits, the appellate court should view the evidence in the light most favorable to upholding the decision of the trial court and, on this basis, there is evidence, inferentially, that appellant transported and concealed a narcotic and direct evidence as to the sale, in that he accepted the purchase price and aided in the delivery of such narcotic.

The evidence admitted relative to the telephone conversations was competent because the "means of communication" was not interfered with and listening at one end of a conversation, with the consent and knowledge of the party at that end, is not an "interception" prohibited by the Communications Act

The Government respectfully submits that the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 15021

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EUGENE RAYSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

ARGUMENT.

I.

This Court May Correct Plain Error.

The appellee's brief does not try to meet the points raised by appellant for a reversal of his conviction. The appellee urges that the conviction of Rayson on counts II and III of the indictment be affirmed on technical procedural grounds.

We are not here concerned with technicalities. The point made by appellant is that the finding that appellant was guilty under counts II and III of the indictment is clearly erroneous, as there is no competent evidence or, in fact, any evidence at all to show that appellant Rayson ever received, concealed, transported or facilitated the

concealment or transportation of a narcotic drug, or ever sold or facilitated the sale of a Narcotic drug to Norman Fletcher.

Furthermore, this Court may reverse appellant's conviction under its power to correct "plain error."

Fed. Rules Crim. Proc., Rule 52(b);

Din v. United States (C. A. 9, Mar. 2, 1956), 232 F. 2d 283.

Also, in *Mosca v. United States* (9th Cir., 1949), 174 F. 2d 448, cited by appellee (Br. p. 6), this Court merely said that the motion for acquittal "need not be considered. However, we have considered it and find no merit in it." (P. 451.)

II.

United States v. Sugden (C. A. 9, Nov. 10, 1955) Applies to This Case.

As has been pointed out in appellant's opening brief (p. 12) in the opinion in *United States v. Sugden, supra*, this Court stated the rule applicable to the case at bar.

In that case the agent of the Federal Communications System merely listened to the radio messages broadcast by the defendants. In the case at bar the officers listened to and recorded the telephone conversations at the receiver of the telephone.

Appellee relies on *United States v. Pierce* (N. D. Ohio), 124 Fed. Supp. 264, affirmed 224 F. 2d 281 (C. A. 6, June 15, 1955).

United States v. Bookie (C. A. 7, Jan. 12, 1956), 229 F. 2d 130;

Flanders v. United States (C. A. 6, Apr. 26, 1955), 222 F. 2d 163; and

United States v. White (C. A. 7, Jan. 6, 1956),
228 F. 2d 832. (Br. pp. 12-13.)

The Supreme Court of the United States, on April 30, 1956, affirmed the judgment in *United States v. Sugden* (76 S. Ct. 709). This is the equivalent of adopting the decision and reasoning of this Court in that case. Consequently, the cases, *supra*, relied upon by appellee, having been decided prior to April 30, 1956, are no longer authority and are of no consequence.

III.

There Is No Evidence Supporting the Finding That Appellant, Rayson, Was Guilty.

As has been pointed out in appellant's opening brief, Fletcher, immediately after he was supposed to have paid \$700.00 to appellant Rayson, left the officers and was absent for two hours, which would have given him ample time to dispose of the money he said he had paid Rayson and to pick up some heroin and plant it under the railroad sign at Budlong and Slauson Avenues in Los Angeles (Br. pp. 13-14).

There is absolutely no evidence in this case that appellant Rayson had anything to do with the delivery of any heroin to the railroad sign, or that he ever had any heroin in his possession.

As appears in appellant's opening brief (p. 1), appellant Rayson and one Ollie W. Kelley were indicted. Count I of the indictment charging defendants Rayson and Kelley with conspiring to possess, sell and conceal narcotics. The Court found Kelley not guilty on all three counts, found appellant Rayson not guilty on the conspiracy count, but guilty on counts II and III which

charged the defendants with unlawful receipt, transportation and concealment of heroin, and with unlawfully selling and facilitating the sale of heroin to one Norman Fletcher (Br. pp. 1-2).

The alleged conversations between appellant Rayson and Fletcher over the telephone as to where the heroin was going to be put, and the other alleged conversations with Fletcher over the telephone, and even the alleged payment of the money for the heroin, are not sufficient to support a conviction of appellant Rayson on either count II or count III, which charged unlawful receipt, transportation, concealment, sale and facilitating the sale of heroin. There is no evidence whatsoever that appellant Rayson delivered any heroin to any person in any manner. The implied finding that appellant Rayson put the heroin under the railroad sign is based upon pure conjecture, and there is no support in the evidence for such implied finding.

If the defendants had been found guilty of a conspiracy under count I of the indictment it might have been argued that the evidence as to the alleged telephone conversations and other activities of the defendants would have sustained the conviction of a conspiracy, because in such case they could have been construed as overt acts in the conspiracy. However, such evidence does not show a violation of either of the statutes alleged in counts II and III of the indictment.

Appellant Rayson respectfully contends that his conviction should be reversed.

Respectfully submitted,

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